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No. 06-

In the Supreme Court of the United States

October Term, 2006

ALLEN W. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a district court fundamentally depart from the teaching in *Gonzalez v. Crosby* and misapply 28 U.S.C. §2244(b)(1) and (2) in asserting it lacks subject-matter jurisdiction to revisit any substantive decision reached in a prior proceeding pursuant to 28 U.S.C. §2255 by way of Federal Rule of Civil Procedure 60(b)(4), (5), or (6)?

2. Should 60(b)(4), (5), or (6) permit an attack on a judgment entered in a prior §2255 proceeding that relied upon an erroneous circuit precedent which subsequently has been overruled by its court of appeals to reflect a decision of this Court predating by a decade the §2255 proceeding?

3. May a district court's refusal to grant a requested hearing in a §2255 proceeding as to matters occurring outside its presence and not of record be challenged under Rule(b)(4), (5), or (6)?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

INDEX TO APPENDIX.....vii

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE.....3

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....11

I. The AEDPA Does Not Deprive a District Court of Jurisdiction to Consider a Rule 60(b)(4), (5), or (6) Attack Upon an Erroneous Substantive Decision Reached in a Previous §2255 Proceeding as the Courts Below Mistakenly Held.....11

A. The Prohibition in 28 U.S.C. §2244 Precluding Successive State Prisoner Habeas Applications Under §2254 is Inapplicable to §2255 Motions.....12

B. Rules 60(b)(4), (5), and (6) Permit an Attack Upon a Substantive Decision Made in a Prior §2255 Proceeding which is Void for Lack of Subject-Matter Jurisdiction, Violates Due Process, or has been Invalidated by a Definitive Interpretation of the Relevant Substantive Criminal Statute by this Court.....16

II. When a Precedent Relied Upon by a District Court to Deny a §2255 Motion is Overruled the then Defective Judgment is Prudently Attacked by a Motion Under Rule 60(b)(4), (5), or (6), as Applicable.....24

III. A District Court's Unexplainable Refusal to Permit a Requested Evidentiary Hearing to Determine Controverted Issues of Fact is a Defect in the Integrity of a §2255 Proceeding Which is Prudently Challenged by a Rule 60(b) Motion to Set Aside the Resulting Deficient Judgment.....26

CONCLUSION.....30

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. Felton, 521 U.S. 203 (1997).....23
Armiente v. United States, 234 F.3d 820 (2nd Cir. 2000).....28
Badaracco v. Comm. of Internal Revenue, 464 U.S. 386 (1984).....14
Bates v. United States, 522 U.S. 23 (1997).....13, 15
Bousley v. United States, 523 U.S. 614 (1998).....6, 19, 26
Bunkley v. Florida, 155 L.Ed.2d 1046 (2003).....7, 21
Calderon v. Thompson, 523 U.S. 538 (1998).....11
Cleveland v. United States, 531 U.S. 12 (2000).....5-11, 19-22, 24-26, 28 *passim*
Davis v. United States, 417 U.S. 333 (1974).....19, 23
Duncan v. Walker, 533 U.S. 167 (2001).....13, 15
Farm Credit Bank of Baltimore v. Ferrera-Goitia, 316 F.3d 62 (1st Cir. 2003).....19
Felker v. Turpin, 518 U.S. 651 (1996).....16
Fiore v. White, 531 U.S. 225 (2001).....19, 20, 21, 26
Gonzalez v. Crosby, 162 L.Ed.2d 480 (2005).....3, 4, 8-11, 13-20, 23-26, 29 *passim*
Griffin v. United States, 520 U.S. 46 (1991).....8, 11, 24-26
Kann v. United States, 323 U.S. 88 (1944).....8
Klapprott v. United States, 335 U.S. 601 (1949).....23
Lubben v. Selective Service, 423 F.2d. 645 (1st Cir. 1972).....22
Machibroda v. United States, 368 U.S. 387 (1962).....28, 29
Middleton v. McNeil, 158 L.Ed.2d 701 (2004).....21
Neder v. United States, 527 U.S. 1 (1999).....6-11, 19, 21, 22, 26
Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661 (1974).....18
Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001).....28
Robinson Eng. Co. Pension Plan & Trust v. George, 223 F.3d 445 (7th Cir. 2000).....20

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).....23
Russello v. United States, 464 U.S. 16 (1983).....13
Schriro v. Summerlin, 542 U.S. 348 (2004).....19, 26
Silber v. United States, 370 U.S. 717 (1962).....20
Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998).....17-19, 26
Strickland v. Washington, 466 U.S. 668 (1984).....27
United States v. Asher, 854 F.2d.1483 (3rd Cir. 1988)....7-9, 24, 25
United States v. Indoor Cultivation Co., 55 F.3d 1311 (7th Cir. 1995).....19
United States v. Martinez, 905 F.2d.709 (3rd Cir. 1990).....5, 21, 22, 24, 28
United States v. Maze, 414 U.S. 395 (1974).....22
United States v. McCoy, 410 F.3d 124 (3rd Cir. 2005).....28
United States v. Menasche, 348 U.S. 528 (1955).....13
United States v. Messino, 382 F.3d 704 (7th Cir. 2004).....28
United States v. Murphy, 323 F.3d 102 (3rd Cir. 2003).....8, 9, 11, 25, 26
United States v. Osser, 864 F.2d.1056 (3rd Cir. 1988).....25
United States v. Peter, 310 F.3d 709 (11th Cir. 2002).....20
United States v. Resendiz-Ponce, No. 05-998 (U.S. 2006).....19
United States v. Rosa-Ortiz, 348 F.3d 33 (1st Cir. 2003).....20
United States v. Stewart, 1997 WL 688815 (E.D. Pa. 1997).....5
United States v. Stewart, 151 F.Supp.2d.572 (E.D. Pa. 2001).....2, 6, 8, 9, 17, 23-26, 28, 29

STATUTES

18 U.S.C. §1341.....4, 6-8, 10, 22
18 U.S.C. §1343.....4, 6-8, 10, 22
18 U.S.C. §1962(c).....4
18 U.S.C. §1957.....4
18 U.S.C. §3231.....6
28 U.S.C. §2244(b)(1).....9-17, 24, 25, 29

28 U.S.C. §2253(b)(2).....9-11, 14-17, 24
28 U.S.C. §2253(c).....2
28 U.S.C. §2254.....3, 4, 9-17, 23, 24, 26, 29
28 U.S.C. §2255.....*passim*
Antiterrorism and Effective Death Penalty Act of 1996
(AEDPA), Pub. L. No. 104-132, April 24, 1996.....1, 11, 12

RULES

Federal Rule of Civil Procedure 60(b)(4).....1, 3, 8, 11, 22, 24
Federal Rule of Civil Procedure 60(b)(5).....1, 3, 8, 11, 22, 23, 24
Federal Rule of Civil Procedure 60(b)(6).....1. 3, 8, 11, 23, 24
Federal Rule of Criminal Procedure 12(b)(2).....2, 3, 5

OTHER

H.R. Cong. Rep. 104-518, 94th Cong. 2nd Sess. 111
(1996).....12
11 Wright, Miller & Kane, Federal Practice and
Procedure (1973 ed.).....20

INDEX TO APPENDIX

Order of the United States Court of Appeals for the Third Circuit, dated July 21, 2006, denying Petitioner's timely petition for rehearing or *en banc* reconsideration of the panel's June 14, 2006 Order.....1a

Order of the United States Court of Appeals for the Third Circuit, dated June 14, 2006, affirming the District Court's decision to deny Petitioner's Motion under Federal Rule of Civil Procedure 60(b) that sought to set aside the judgment denying his Motion pursuant to 28 U.S.C. §2255 to vacate his conviction and sentence.....2a

Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, dated September 13, 2005, denying Petitioner's Rule 60(b) Motion to set aside its judgment that denied his §2255 Motion.....3a

Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, dated June 7, 2001, denying Petitioner's §2255 Motion to set aside his conviction and sentence.....9a

Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, dated October 23, 1997, denying Petitioner's Motion under then Federal Rule of Criminal Procedure 12(b)(2) to dismiss the indictment for failure to allege facts constituting the charged offense.....28a

Constitutional and Statutory Provisions at Issue.....36a

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No. 06-_____

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Your Petitioner, Allen W. Stewart, respectfully requests the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit which summarily affirmed the District Court's decision holding that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) bars Federal Rules of Civil Procedure 60(b)(4), (5), or (6) from being invoked to vacate any substantive decision made in a prior proceeding under 28 U.S.C. §2255, even when that ruling plainly conflicts with a contrary statutory interpretation of this Court that narrowed the scope of the relevant criminal statute so as to render noncriminal the specific factual conduct charged in the indictment.

OPINIONS BELOW

1. The June 14, 2006 order of the Court of Appeals for the Third Circuit affirming, without discussion, the District Court's decision to deny Petitioner's Rule 60(b) Motion that sought to set

aside the judgment denying his §2255 Motion is unreported (App. 1a), as is its July 21, 2006 denial of his timely petition for rehearing or *en banc* reconsideration of the panel's Order (App. 2a).

2. The September 13, 2005 memorandum opinion and order of the District Court denying Petitioner's Rule 60(b) Motion to set aside the judgment denying his §2255 Motion is unreported (App. 3a), as is its April 5, 2006 order refusing, without explanation, a certificate of appealability (COA) authorizing appellate review of its decision (App. 8a).

3. The June 7, 2001 memorandum opinion and order of the District Court denying Petitioner's §2255 Motion to set aside his conviction and sentence, which also refused *sua sponte* and without explanation a COA to review that judgment, is reported at 151 F.Supp.2d 572 (E.D. Pa. 2001) (App. 9a).

4. The October 23, 1997 memorandum opinion of the District Court denying Petitioner's motion pursuant to then Federal Rule of Criminal Procedure 12(b)(2) – now Rule 12(b)(3)(B) – seeking dismissal of the indictment for failure to allege specific facts constituting an offense against the laws of the United States is unreported (App. 28a).

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit denied Petitioner's request for a COA to review the District Court's Judgment denying his Rule 60(b) Motion on June 14, 2006, and thereafter, on July 21, 2006, declined a petition for rehearing or reconsideration *en banc* of that decision. This Court therefore has jurisdiction under 28 U.S.C. §2253(c) to grant COA to review the ruling below on certiorari pursuant to 28 U.S.C. §1254(1), although Petitioner maintains the District Court lacked subject-matter jurisdiction to have proceeded to a trial on the merits given that in post-trial, fully-retroactive decisions, this Court has concluded the specific factual conduct alleged in the indictment

did not, as a matter of statutory interpretation, constitute the offenses of conviction.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The constitutional and statutory provisions here at issue are reproduced in the accompanying Appendix as required by Supreme Court Rule 14.1(f). These include the "Suspension Clause" from Article I, Section 9 of the United States Constitution, as well as the "Due Process Clause" of the Fifth Amendment and the "Assistance of Counsel Clause" of the Sixth Amendment. The statutory provisions are those at 18 U.S.C. §§1341, 1343, and 3231; 28 U.S.C. §§2244, 2254, and 2255; Federal Rule of Criminal Procedure 12(b)(2), as in effect at the time of trial; and Federal Rules of Civil Procedure 60(b)(4), (5), and (6). (App. 36a-39a).

STATEMENT OF THE CASE

This case presents important questions as to the scope of the AEDPA and the availability of Federal Rule of Civil Procedure 60(b) to redress plain errors in a proceeding under 28 U.S.C. §2255 in light of the conflict with the Due Process and Suspension Clauses created by the judgment below which concluded a district court is without jurisdiction to revisit under Rule 60(b)(4), (5), or (6) *any* substantive decision made during such a proceeding. Indeed, should this erroneous judgment not be set aside, federal prisoners would be barred from challenging all nonprocedural rulings made in a §2255 proceeding, even where as in this case the district court unquestionably interpreted the scope of the relevant substantive criminal statute in a manner contrary to that of this Court's definitive construction.

While *Gonzalez v. Crosby*, 162 L.Ed.2d 480 (2005),[1] concluded a "defect in the integrity of the federal habeas proceedings" may be attacked by means of Rule 60(b), *id.* at 493,

[1] Where the text of a case was not available locally in the United States Reports format, citation has been made to the Lawyer's Edition.

its analysis was confined to "consideration [of] §2254 cases." *Id.* at 491 n.3. Accordingly, the parameters it established as to what "defects" are actionable under Rule 60(b) were necessarily delimited by the constraints of 28 U.S.C. §2244 and §2254, the provisions governing state prisoner habeas applications, which as Justice Scalia noted, differ from those applicable to federal prisoner motions made under §2255. *Id.* This distinction is critical for §2244(b)(1) and (2), which were quoted in *Gonzalez* and largely dictated its result, *id.* at 491-93 and n.4, are by their terms applicable only to §2254 proceedings (App. 37a), a fact the District Court's Opinion[2] wholly ignored. This certain error and those others noted herein urgently require the Court delineate the scope of Rule 60(b)(4), (5), and (6) within the §2255 context lest other courts similarly misconstrue the teaching in *Gonzalez*.

In the case at bar, the indictment charged Petitioner with having violated the mail and wire fraud statutes (18 U.S.C. §1341 and §1343) (App. 36a-37a) by allegedly causing an insurance company then owned by his family to send mailings and wirings purportedly containing false or misleading information to state agencies for the purpose of obtaining or retaining state regulatory licenses.[3] The charging document then postulated that by procuring and maintaining those licenses, the insurer could thereby collect premiums from policyholders and customers, while paying dividends and fees, conduct it alleged constituted mail and wire fraud although none of the charged mailings and wirings were claimed to have been sent for any purpose save to secure and retain state regulatory licenses.

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[2] District Court's September 13, 2005 Opinion and Order denying Petitioner's Rule 60(b) Motion (herein the "Opinion") at 3 (App. 5a).

[3] Petitioner was also charged with a derivative RICO offense (18 U.S.C. §1962(c)), but certainly not the "135 counts of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO")" claimed in the Opinion. (App. 3a). The indictment also charged Petitioner with illegal monetary transactions (18 U.S.C. §1957), but as with the RICO count, such were wholly premised on the flawed mail and wire fraud allegations.

Prior to trial, Petitioner challenged the legal sufficiency of the indictment pursuant to then Federal Rule of Criminal Procedure 12(b)(2). (App. 40a). He asserted that because a majority of the circuits had recognized state regulatory licenses were not "property" within the compass of the federal fraud statutes, the indictment should be defenestrated. However, basing its decision on *United States v. Martinez*, 905 F.2d 709 (3rd Cir.), *cert. denied*, 489 U.S. 1017 (1990), where a professional medical license was held to be qualifying property, the District Court denied the motion to dismiss.[4] *United States v. Stewart*, 1997 WL 688815 (E.D. Pa. October 23, 1997) ("Stewart I") (App.28a). The prosecution was therefore permitted to proceed to trial on its questionable licensing theory, the sole theory of criminal liability alleged in the indictment and recognized in *Stewart I*.[5]

Three months after Petitioner's conviction became final with the denial of his certiorari petition that sought review of the licensing issue (528 U.S. 1063 (1999)), a writ of certiorari was granted on that very question in *Cleveland v. United States*, No. 99-804 (March 20, 2000). Subsequently, in a unanimous opinion, it was held as a matter of statutory interpretation state regulatory licenses do not constitute "property" within the scope of the mail fraud statute. *Id.*, 531 U.S. 12, 26-27 (2000). *Cleveland* thus overruled the contrary view in *Martinez* (which it cited at 18) and decriminalized the specific factual conduct for which Petitioner was improperly charged and convicted, and now for more than eight years, has been wrongfully imprisoned.

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[4] The District Court further hypothesized in *Stewart I* that the indictment alleged "more than an effort to obtain money and property," claiming such included an "honest services" deprivation under 18 U.S.C. §1346 (App. 33a). But that theory found no traction with the Government as it explicitly disavowed any such charge existed in the indictment and presented no evidence in support of that theory of criminal liability at trial.

[5] While the District Court represented in the Opinion the licensing theory was but "one of the mail fraud theories used by the government," (App. 6a), the indictment is devoid of any alternative theory of criminal liability as *Stewart I* acknowledged. (App. 32a-33a).

A month after *Cleveland* was published, Petitioner filed a timely initial §2255 motion to have his conviction and sentence vacated. (App. 3a). The motion demonstrated that after *Cleveland* and *Neder v. United States*, 527 U.S. 1 (1999), where "materiality" was held to be an essential element of the federal fraud statutes, *id.* at 57, those fully-retroactive decisions so narrowed the scope of §1341 and §1343 that: (a) the District Court had lacked subject-matter jurisdiction to have proceeded to a trial on the merits because the indictment failed to charge an offense against the laws of the United States as required by 18 U.S.C. §3231; (b) Petitioner was actually innocent because the charging document did not allege conduct constituting the offenses for which he was convicted; and (c) since neither the indictment alleged specific facts amounting to the charged offenses, nor the prosecution had proven beyond a reasonable doubt all the material elements of those offenses, his conviction could not stand.

While the District Court recognized "*Cleveland* held that licenses issued by states are not property within the meaning of the federal fraud statute" and even "using a scheme or artifice to defraud in order to obtain a license from a state regulator does not constitute a violation of §1341," it nonetheless denied the §2255 Motion contending the claim had been procedurally defaulted though presented at trial and on certiorari because such was not noticed on direct appeal. *United States v. Stewart*, 151 F.Supp.2d 572, 574-75 (E.D. Pa. 2001) ("Stewart II") (App. 10a.). It also rejected all jurisdictional, actual innocence, and due process claims flowing from *Cleveland* and *Neder* which would have excused any purported procedural default.[6] *Id.* at 575-77 (App. 10a-14a).

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[6] The District Court, for example, simply assumed it had jurisdiction and relying on *Bousley v. United States*, 523 U.S. 614 (1998), where the scope of the relevant criminal statute in that case was narrowed and the procedural default rule applied, believed the same result should obtain here. *Stewart II*, 151 F.Supp.2d at 575 and n.4 (App. 10a-11a). However, unlike the instant case, the issue in *Bousley* was not whether the indictment alleged an offense, but rather given the statute's narrowed reach, could the charged conduct be proven beyond a reasonable doubt – an evidentiary question. Here Petitioner's conduct is not at issue for *Cleveland* plainly held as a matter of law the indictment's licensing theory, based as it was on mailings and wirings sent to obtain or retain state regulatory licenses, could not amount to a §1341 or §1343 offense. That substantive deficiency therefore divested the District Court of subject-matter jurisdiction, rendered the charged conduct non-criminal, and underscored Petitioner's actual innocence for "the Due

Moreover, the District Court refused, without explanation, the evidentiary hearing Petitioner requested to prove, among other matters, appellate counsel rendered constitutionally ineffective assistance in failing to notice the defective licensing theory although then recent decisions from other circuits had distinguished between regulatory licenses and professional licenses, holding the former were not property.

Given the weakness of its procedural default finding as measured by the teaching in *Cleveland* and *Neder* that invalidated the indictment's sole theory of criminal liability while confirming Petitioner's actual innocence of the charged offenses, the District Court also argued on the basis of *United States v. Asher*, 854 F.2d 1483 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989), that the presence "of the invalid license theory d[id] not mandate [Petitioner's] conviction be vacated" because "'the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses.'" *Id.*, 151 F.Supp.2d at 583 (quoting *Asher*, 854 F.2d at 1494) (App. 23a). In reaching this end, the District Court rather remarkably perceived no conflict with its decision in *Stewart I* where it observed in rejecting the Rule 12(b)(2) motion that the licensing theory, now invalidated by *Cleveland*, was the crux of the indictment because the charged mailings and wirings had been sent to obtain or "retain the certificate[s] authorizing [the insurer] to conduct business." *Id.* at *4 (App. 33a). Moreover, the Opinion maintained that even "if the jury were to have found a scheme to obtain licenses, the ultimate purpose of such a scheme necessarily would have been to enable [Petitioner] to obtain money and property in the form of premiums from policyholders and customers, dividends, [and] fees," thereby constituting a §1341 and §1343 offense even in the absence of the mailing and wiring elements and the presence of "an invalid legal

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Process Clause...forbids a State to convict a person of a crime without proving the elements of the crime beyond a reasonable doubt," an impossibility when the indictment fails to charge an offense. *Bunkley v. Florida*, 155 L.Ed.2d 1046, 1051 (2003).

theory in the indictment and the [jury] charge." *Stewart II*, 151 F.Supp.2d at 583 (App. 23a).[7]

After the District Court refused *sua sponte* to grant a COA, the Court of Appeals similarly declined, without explanation, to review the decision, and certiorari was again denied, the Third Circuit decided *United States v. Murphy*, 323 F.3d 102 (3rd Cir. 2003). There it concluded the "bottom line" or "ultimate consequences" rationalization crafted in *Asher*, which the District Court had seized upon to transcend *Cleveland* and *Neder* while denying Petitioner's actual innocence claim, had been "undermined" a full decade before *Stewart II* by *Griffin v. United States*, 502 U.S. 46 (1991). *Id.* at 109-10.[8] *Murphy* also concluded that given *Griffin*, "current precedent *dictates* that, should we find one of the Government's theories of mail fraud legally invalid, we *must reverse* [the defendant's] conviction." *Id.* (emphasis added).

In light of *Murphy*'s tutelage, Petitioner submitted the instant Rule 60(b) Motion. It argued the post-trial, fully retroactive decisions of *Cleveland* and *Neder*, now freed by *Murphy* from the asserted fetters of *Asher*, had (i) divested the District Court of subject-matter jurisdiction to have proceeded to a merits trial, (ii) invalidated the indictment's singular theory of criminal liability, and (iii) underscored Petitioner's actual innocence of the crimes of conviction – all claims cognizable under Rule 60(b)(4), (5), or (6). While the §2255 Motion was pending, *Gonzalez* was decided.

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[7] The District Court's unique view in *Stewart II* not only marginalized *Cleveland* and *Neder*, but wholly undercut *Kann v. United States*, 323 U.S. 88, 95 (1944), which had held §1341 reaches only "those limited instances in which the use of the mails is a part of the execution of the fraud." Then, too, overlooking the "purpose" of the charged mailings and wirings, an essential element of a §1341 or §1343 offense, the Opinion surprisingly claimed that at "trial there was virtually no evidence regarding the obtaining or retaining of licenses" contrary to its observation in *Stewart I* that the charged mailings and wirings were sent for the purpose of obtaining or retaining state regulatory licenses. *Id.*, 151 F.Supp.2d at 580 (App. 19a).

[8] Notably *Murphy* reached its conclusion following precisely the same reasoning Petitioner had presented in his §2255 Motion, but which the District Court rejected in citing *Griffin* incorrectly to the opposite effect, an error unfortunately ignored when a COA was sought from the Court of Appeals to review that decision. *Id.*, 151 F.Supp.2d at 578-80 (App. 16a-18a).

There the Court held that because §2244(b)(1) governs §2254 proceedings, a habeas application filed by a state prisoner "that has already been adjudicated in a previous petition must be dismissed." *Id.* at 491. On that basis, *Gonzalez* concluded a Rule 60(b) petition filed in a §2254 proceeding which "attacks the federal court's previous resolution of a claim *on the merits*...is indistinguishable from alleging that the movant is, under the substantive provisions of the statute entitled to habeas relief," requiring that claim be pursued in a successive application complying with §2244(b)(2). *Id.* at 492-93 and n.4 (emphasis in original).

Disdaining the inherent limitations of §2244(b)(1) and (2) which confine their application to §2254 proceedings (App. 37a), the District Court asserted it could, for "present purposes" *assume* "second and successive motions under §2254 and §2255 are treated the same." Opinion at 3 (App. 4a). Having so framed the issue, since *Gonzalez* had concluded "a Rule 60(b) motion will be considered a de facto petition under §2254 if it brings a 'claim,' that is, if the motion 'attacks the federal court's previous resolution of a claim *on the merits*'," *id.*, 162 L.Ed.2d at 492, and is therefore precluded by §2244(b)(1), the District Court was able to reject the Rule 60(b) Motion although the quoted language is wholly inapplicable to a §2255 motion. *Id.* at 4-5 (App. 5a-6a). Moreover, although acknowledging the instant Motion had attacked the trial court's subject-matter jurisdiction given the full retroactivity of *Cleveland* and *Neder*, a challenge of the character *Gonzalez* expressly sanctioned,[9] the District Court simply assumed away the issue as it had in *Stewart II*, claiming it possessed jurisdiction to have proceeded to a trial on the merits. *Id.* at 4 (App. 5a-6a).

The District Court also rejected Petitioner's assertion *Stewart II* must be vacated for in *Murphy* the Third Circuit had repudiated *Asher's* "ultimate consequences" rationale, characterizing such as merely another assault on the "legal basis of his conviction," which the District Court maintained such was

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[9] In recognizing "Rule 60(b) has an unquestionably valid role to play in habeas cases," Justice Scalia wrote that it also "preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction." *Gonzalez*, 162 L.Ed.2d at 494.

foreclosed by §2244(b)(1). Then too, the Opinion disclosed the District Court had denied the §2255 Motion because it believed "certain insurance licenses were property under the mail fraud statute," not withstanding *Cleveland*, and such supported Petitioner's conviction. *Id.* at 5 (App. 6a). Of course, given that this Court held state regulatory licenses fail as a matter of statutory interpretation to qualify as "property" for purposes of the federal fraud statutes, it was plain error for the District Court to have based its decision on that faulty premise, a defect which under Rules 60(b)(4), (5), or (6) undermined the "integrity" of the §2255 proceeding and demands correction under Rules 60(b)(4), (5),or (6), for it has produced a grievous miscarriage of justice as Petitioner is unmistakably innocent of the alleged offenses of conviction.

Viewed through the prism of its discrepant analysis, it is unsurprising the District Court characterized the Rule 60(b) Motion as an attempt "to do precisely what *Gonzalez* [and] §2244 forbid, [that is,] to relitigate substantive issues already decided by this Court in a prior proceeding," and thus to insist it lacked "jurisdiction over [the] motion." *Id.* at 5 (App. 6a). But that resolution fails to apprehend the differences between §2254 and §2255, ignores the teaching in *Gonzalez*, and turns a blind eye to the fact §2244(b)(1) and (2) apply only in the §2254 context – all matters belying its conclusion.

More fundamentally, the District Court also denied full retroactivity to the definitive interpretations of the federal fraud statutes wrought by *Cleveland* and *Neder*. Rulings that not only divested it of subject-matter jurisdiction, but demonstrated Petitioner was convicted in violation of the Due Process Clause which requires proof of all the elements of an offense beyond a reasonable doubt; an impossibility here as the alleged "scheme" and "purpose" of the charged mailings and wirings were to obtain and retain state regulatory licenses as charged in the indictment, an end *Cleveland* held cannot constitute a §1341 or §1343 offense. The Opinion's further admission that the District Court, in denying the Rule 60(b) Motion, had premised that erroneous decision on its "holding that certain insurance licenses were property under the mail fraud stature," *id.* at 5 (App. 6a), apparently in the mistaken

belief *Cleveland* and *Neder* are not fully retroactive or *Murphy* and *Griffin* are somehow inapplicable, serves but to underscore its flaws, ones validly attacked under Rule 60(b) for such meets "the need to allow courts to remedy actual injustice" created by errors resulting in the imprisonment of the innocent. *Calderon v. Thompson*, 523 U.S. 538, 558 (1998).

REASONS FOR GRANTING THE WRIT

I

The AEDPA Does Not Deprive a District Court of Jurisdiction to Consider a Rule 60(b)(4), (5), or (6) Attack Upon an Erroneous Substantive Decision Reached in a Previous §2255 Proceeding as the Courts Below Mistakenly Held.

The AEDPA ushered in a number of material changes to the habeas corpus process embodied in the prior versions of §2254 and §2255, but those reforms did not make these provisions mere carbon copies. Rather, the present 28 U.S.C. §2254 and §2255, as did their predecessors, mirror the substantive differences in the underlying processes which give birth to a valid federal habeas corpus claim. This was recognized in *Gonzalez* as requiring the Court "limit our consideration to §2254 cases" when it undertook to identify under what circumstances Rule 60(b) could properly be invoked to attack a judgment made in a previous federal habeas proceeding since the "AEDPA did not expressly circumscribe the operation of Rule 60(b)." *Id.*, 162 L.Ed.2d at 491 and n.3.

The Court's recognition of §2254, and its companion finality provisions in §2244(b)(1) and (2), apply only to state prisoner applications (App. 37a) did not, however, deter the District Court below from imprudently concluding *Gonzalez* and §2244(b)(1) barred all substantive decisions made in a prior §2255 proceeding from attack under Rule 60(b)(4), (5), or (6). But because that blanket prohibition is not compelled by the AEDPA, is inapposite to *Gonzalez* and other prior rulings of this Court, and

would in application violate the Due Process Clause, the Court should prudently grant a writ of certiorari to correct the mistaken judgment below and provide guidance for the federal courts as to the proper scope of Rule 60(b) in the §2255 context.

A. The Prohibition in 28 U.S.C. §2244 Precluding Successive State Prisoner Habeas Applications Under §2254 is Inapplicable to §2255 Motions.

The Conference Committee report which accompanied the bill enacted as the AEDPA explained that, among other matters not relevant here, it sought to:

> curb the abuse of the statutory writ of habeas corpus [by] revis[ing] the procedures for consideration of a writ in federal court [and in] providing for the exhaustion of state remedies and requir[ing] deference to the determinations of state courts that are neither 'contrary to,' nor an 'unreasonable application of,' clearly established law.

H.R. Cong. Rep. 104-518, 94th Cong., 2d Sess. 111 (1996). To achieve those objectives, the AEDPA created a one-year limitation period within which a petition must be filed, restricted the availability of successive petitions, and imposed a COA requirement to obtain appellate review of a district court's adverse determination. The report's other objectives, those requiring the exhaustion of state remedies and deference to state court decisions, were incorporated in an amended §2244 and §2254. (App. 37a-38a). But no comparable provision requiring like deference to the substantive decisions of a district court in a previous §2255 proceeding was added. Nor does §2255 contain any provision akin to §2244(b)(1) which requires "[a] claim presented in a second or successive habeas application under section 2254 that was presented in a prior application shall be dismissed." (App. 37a).

The District Court below, however, overlooked these material differences between the provisions governing state prisoner habeas applications under §2254 and those pertinent to federal prisoner motions made pursuant to §2255, stating that in analyzing Petitioner's Rule 60(b) Motion it had *assumed* that "[for] present purposes, second and successive motions under §2254 and §2255 are treated the same." Opinion at 3 (App. 4a). But, of course, this faulty premise, which led to the District Court's erroneous holding that even in the context of a §2255 proceeding "*Gonzalez* [and] §2244 forbid [use of Rule 60(b)] to re[visit] substantive issues already decided by t[he] [District] Court in a prior habeas proceeding" is inherently invalid. Opinion at 5 (App. 6a). Indeed, to reach its result the District Court necessarily ignored the plain language of §2244(b)(1) limiting the application of its proscription solely to a "habeas corpus application under section 2254" for nowhere does §2244(b)(1) suggest, much less state, it has any relevance in the §2255 context.

This Court has repeatedly observed that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). As §2244 and §2255 were both amended by "the same Act," that is, the AEDPA, there is not reason to believe the language in §2244(b)(1) confining its application to §2254 proceedings was unintentional.

In some respects, the District Court's attempt to render redundant the §2254 limitation in §2244(b)(1) resembles the issue in *Duncan v. Walker*, 533 U.S. 167 (2001). There the Court was asked to interpret another provision of the AEDPA, that is §2244(d)(2), in a way which "would render the word 'State' insignificant, if not superfluous," to expand the provision's scope. *Id.* at 173. In rejecting that suggestion, the Court observed it has a "duty 'to give effect, if possible, to every clause and word of a statute'," *id.* at 174 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)), for "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of

improvement." *Badaracco v. Comm. of Internal Revenue*, 464 U.S. 386, 398 (1984).

Not only does §2244(b)(1) fail to furnish the statutory anchor the Opinion pointed to as supporting its hypothesis, but the further citation to §2244(b)(2)(A), which it quotes from *Gonzalez*, is similarly unavailing for such also applies only to "[a] claim presented in a second or successive habeas corpus application under section 2254." *Id.* at 3 (App. 5a). While that constraint undermines any reliance on §2244(b)(1) or (2) to sustain the District Court's prohibition against Rule 60(b) challenges to substantive decisions in a prior §2255 proceeding, the differences between the rules applicable to successive §2254 applications found in §2244(b)(2) and the comparable, yet dissimilar provisions in §2255 underscore the comity and federalism concerns Congress addressed in §2244 and §2254, but which are not relevant to §2255 motions.

Gonzalez described §2244(b)(2) as requiring a successive habeas application under §2254 containing a *claim* "that has *not* already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Id.*, 162 L.Ed.2d at 491 (emphasis in original). This requirement of a *new claim* reflects the proscription in §2244(b)(1) against successive claims for as *Gonzalez* observed:

> Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction – even claims couched in the language of a true Rule 60(b) motion – circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts.

Id. at 492. Had the District Court limited its prohibition against Rule 60(b) review of substantive decisions made in a prior habeas proceeding to §2254 cases, *Gonzalez* would provide strong support, save for those exceptions it cites that are discussed below. But when the Opinion sought to import the prohibitions from

§2244 to a §2255 proceeding, it not only ran afoul of the limiting language of §2244, but necessarily neglected the more expansive rule applicable to successive §2255 motions, one authorizing petitions based on "newly discovered evidence," as well as a new and retroactive rule of constitutional law, which in neither instance requires such be incident to a "new claim" as must a successive §2254 application. (App.38a).[10]

Duncan and *Bates* teach that such material differences in language as §2255 and §2244(b)(2) exhibit cannot simply be ignored. By confining successive §2254 applications to those based on a *new claim* grounded to a *new* constitutional rule or a *new claim* tied to a *new* "factual predicate," Congress plainly confirmed in §2244(b)(2) the ban on successive litigation set out in §2244(b)(1); but such says nothing as to successive §2255 motions. In contrast, §2255 does not mandate, nor contemplate, that a successive motion include a new claim; in fact, it nowhere refers to a "claim" as does §2244. Rather, a successive §2255 motion needs only be based on "newly discovered evidence," which itself could be "clear and convincing evidence" supporting a *prior claim* that so augmented now demonstrates a strong probability of actual innocence. Given this more pliant standard, a Rule 60(b) attack upon a prior substantive decision is not foreclosed in the §2255 context as it would in the §2254 setting where §2244(b)(1) and (2) control.[11]

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[10] The Opinion quotes a truncated snippet from *Gonzalez* as stating "a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent §2244(b)(2)(A)...", but omits the possessive in the original that makes clear the cited section is a modifier and the purported restraint is limited to §2254 cases. *Id.* at 3 (App.5a). When faithfully replicated, the quoted sentence indicates in continuation that it was "*§2244(b)(2)(A)'s dictate* that the only new law on which a successive petition may rely is 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable'," because only *new claims* may be advanced in a successive §2254 application. *Gonzalez*, 162 L.Ed.2d at 492 (emphasis added). But as the §2244(b)(2) limitation and focus upon *new claims* applies solely to successive §2254 habeas applications, it does not preclude every "Rule 60(b) motion based on a change in the substantive law," only those within the purview of §2244, which by its terms does not implicate a §2255 motion.

[11] The absolute bar precluding the use of Rule 60(b) to remedy plainly incorrect substantive decisions reached in a prior §2255 proceeding which the District

B. Rules 60(b)(4), (5), and (6) Permit an Attack Upon a Substantive Decision Made in a Prior §2255 Proceeding which is Void for Lack of Subject-Matter Jurisdiction, Violates Due Process, or has been Invalidated by a Definitive Interpretation of the Relevant Substantive Criminal Statute by this Court.

The absence of a statutory bar precluding invocation of Rule 60(b)(4), (5), or (6) to attack an erroneous substantive determination made in a prior §2255 proceeding does not, of course, automatically authorize its employment should such otherwise be precluded by the AEDPA. The immediate issue is therefore whether by creating a statutory process whereby qualifying successive §2255 motions may be adjudicated, Congress intended such to be exclusive. By merely stating the issue though compels its answer for *Gonzalez* held that some errors, even in a prior §2254 proceeding, were proper grist for Rule 60(b) remediation.

While hardly providing an exhaustive list, *Gonzalez* observed that when "a previous ruling which precluded a merits determination was in error – for example, a denial for such reasons

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Court claimed §2244(b)(1) and (2) dictate would also seemingly run afoul of the Constitution's prohibition against suspension of the writ of habeas corpus except in cases of rebellion or invasion. (App. 36a). For taken literally, §2244(b)(1) bars review of all claims previously adjudicated, while §2244(b)(2) bars any successive petition not based on a new claim. Thus, if the habeas court mistakenly entered a default judgment, lacked subject-matter jurisdiction, or its interpretation of the relevant substantive criminal statute was contrary to that of a definitive interpretation of this Court, or the State's highest court, as appropriate, no avenue would be available for redress. Yet, in *Felker v. Turpin*, 518 U.S. 651 (1996), the Court rejected a like Suspension Clause challenge to the AEDPA concluding the alternative of filing an original habeas petition with it avoided the prohibition, although noting in *dicta*: "Whether or not we are bound by the [§2244(b)(1) and (2)] restrictions, they certainly inform our consideration of original habeas petitions." *Id.* at 663. Happily, since neither §2244(b)(1), nor (2), are applicable to a §2255 proceeding, it is not necessary to reach this constitutional issue to reject the District Court's erroneous hypothesis and permit the employment of Rule 60(b) to vacate defective judgments entered in a §2255 proceeding.

as failure to exhaust, procedural default, or statute-of-limitations bar," those errors avoid the limitations of §2244(b)(1) and (2) permitting reconsideration under Rule 60(b) for the petitioner in such cases is not asserting a new claim. *Id.* at 492 n.4. But it is not only such "procedural" defects *Gonzalez* recognized as escaping the bar of §2244 for it cited "[f]raud on the federal habeas court [as] one example of such a defect" infecting the "integrity of the federal habeas proceedings" that may validly be attacked under Rule 60(b)(3), even in the §2254 context. *Id.* at 493 n.5.

Justice Scalia in penning *Gonzalez* also indicated Rule 60(b) "is often used to relieve parties from the effect of a default judgment mistakenly entered against them, a function as legitimate in habeas cases as in run-of-the-mine civil cases," although such arguably could be classified as a "new claim" for it seeks reversal of a prior substantive decision. *Id.* at 494 (internal citation omitted). Moreover, he indicated Rule 60(b) "also preserves [the] parties' opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction – a consideration just as valid in habeas cases as in any other, since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties," citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94, 102 (1998). *Id.*

The reference to *Steel Co.* in this context is particularly instructive for the courts have often observed the term "jurisdiction" is susceptible to "many, too many, meanings." *Steel Co.* at 90 (quoting *United States v. Vanness*, 83 F.3d 661, 663 n.2 (D.C. Cir. 1996). But for current purposes there is no need to plumb those myriad possibilities. The specific page references cited in *Steel Co.* point to those situations *Gonzalez* envisioned where Rule 60(b)(4) could be invoked to vacate a prior decision because the "the judgment is void." First, when a court *assumes* "jurisdiction for the purpose of deciding the merits," *Steel Co.* teaches the resultant judgment is invalid "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94. Applying this teaching to the instant case, it is clear the District Court breached that constitutional divide by assuming jurisdiction to reach the merits in *Stewart II*, as it did again in the Opinion,

ultra vires acts making the judgment denying Petitioner's §2255 Motion receptive to the Rule 60(b)(4) attack in the subject Motion.

The second *Steel Co.* reference cited in *Gonzalez* addresses the question what "cases and controversies [are] amenable to, and [may be] resolved by, the judicial process," that is, when does there exist a justiciable issue permitting a merits determination. *Id.* at 102. In writing for the Court's majority in *Steel Co.*, Justice Scalia explained:

> It is firmly established in our cases that the absence of a valid [as opposed to arguable] cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case [for] the district court has jurisdiction if the right of the petitioners to [relief] under their [petition] will be satisfied if the Constitution and laws of the United States are given one construction and will be defeated if they are given another unless the claim[s] [are] wholly insubstantial and frivolous.

Steel Co. at 89 (emphasis in original, internal quotation marks omitted). Conversely, "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper [whenever] the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy'." *Id.* (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). Thus if the specific factual conduct alleged in the indictment fails to state the offense charged because this Court in interpreting the relevant substantive criminal statute has held such conduct, no matter how overwhelming the evidence of that conduct, cannot amount to a violation of that statute, then the district court is divested of subject-matter jurisdiction.

The absence of subject-matter jurisdiction being a fundamental defect which cannot be cured, it necessarily follows that when lacking such any resultant conviction is void compelling

its vacatur for "a void judgment is a legal nullity," *Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 67 (1st Cir. 2003), making it "a *per se* abuse of discretion for a district court to deny a movant's motion to vacate a void judgment under Rule(b)(4)." *United States v. Indoor Cultivation Company*, 55 F.3d 1311, 1317 (7th Cir. 1995). Applying these principles to the instant case it is evident that while *Cleveland* was handed down after his conviction became final, which precluded this decision from having "foreclosed by *prior* decisions of this Court" Petitioner's trial, the date when *Cleveland* issued is of no consequence for a definitive interpretation of the relevant substantive statute is fully retroactive. *Steel Co.*, 523 U.S. at 89 (emphasis added).

Gonzalez recognized this principle in observing that "reopening cases long since final" may be necessary to reflect "[a] change in the interpretation of a *substantive* statute [which] ha[s] consequences for cases that have already reached final judgment, particularly in the criminal context," citing *Bousley*, 523 U.S. at 619-21, and *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (*per curiam*). *Id.*, 162 L.Ed.2d at 495 and n.9. In *Bousley*, the Court explained that while a new rule of criminal procedure is not retroactive, "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct [will] necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'," are fully retroactive. *Id.*, 523 U.S. 614, 620-21 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). More recently, in *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004), the Court confirmed this principle stating that "[a]s to convictions that are already final,...[n]ew substantive rules generally apply retroactively [particularly] decisions that narrow the scope of a criminal statute by interpreting its terms."[12]

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[12] Unlike *United States v. Resendiz-Ponce*, No. 05-998, which was argued before the Court earlier this month, the error asserted here is not the product of an indictment's failure to plead an element of the offense, but rather that in light of *Cleveland* and *Neder* the indictment in this case relied upon an invalid theory of criminal liability to allege conduct which does not amount to the charged offenses, a fundamental error repeated in the jury charge as the District Court acknowledged in *Stewart II*. (App. 18a).

Given this doctrine of full retroactivity, whenever an indictment fails to allege specific facts amounting to the charged offense, even where measured by a post-conviction decision interpreting the relevant substantive criminal statute, the district court is divested of subject-matter jurisdiction. Accordingly, when the district court in a prior §2255 proceeding failed to assure itself of subject-matter jurisdiction, or denied a jurisdictional challenge without giving full effect to a post-conviction interpretation of the relevant criminal statute that narrowed its scope and decriminalized the specific factual conduct alleged in the charging document, that error is prudently attacked under Rule 60(b)(4). *See Silber v. United States*, 370 U.S. 717 (1962).[13]

While the absence of subject-matter jurisdiction divests a court of the authority to proceed to the merits, thereby invalidating any resultant judgment, a judgment is also "void for purposes of Rule 60(b)(4) if the court that rendered it acted in a manner inconsistent with due process." *Robinson Eng. Co. Pension Plan & Trust v. George*, 223 F.3d 445, 448 (7th Cir. 2000); 11 Wright, Miller & Kane, *Federal Practice and Procedure* §2862 (1973 ed.) (same). In *Fiore*, *supra*, which *Gonzalez* cited in noting subsequent interpretations of substantive criminal statutes are fully retroactive, *id.*, 162 L.Ed.2d at 495 n.9, the petitioner had been convicted for conduct the Pennsylvania Supreme Court later determined in a companion case did not constitute the charged offense. Yet, the state courts refused post-conviction relief. On certiorari review of his federal habeas application, this Court reversed stating that one cannot "consistently with the Federal Due

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[13] Other circuit courts, contrary to the decision below, have recognized subsequent decisions of this Court narrowing the scope of the relevant criminal statute so that the specific facts alleged in the indictment no longer amount to the charged offense divest a court of subject-matter jurisdiction. For example, in *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002) (*per curiam*), the petitioner sought a writ of error *corum nobis* arguing that since he had been convicted of a RICO offense based on mail fraud predicates arising from the procurement and retention of regulatory licenses, *Cleveland* required his conviction be vacated. The Eleventh Circuit agreed and held that "a district court lacks jurisdiction when an indictment alleges only a non-offense" and directed the writ "issue to correct the judgment the [district] court never had the power to enter." *Id.* at 715-16. *See United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003) ("A federal court sim[ply] lacks jurisdiction to enter a judgment of conviction when the indictment charges no offense under federal law.").

Process Clause [be] convict[ed] for conduct that [the] criminal statute as properly interpreted does not prohibit." *Fiore*, 531 U.S. at 228. Later in *Bunkley*, the Court was again confronted with a situation where a post-conviction interpretation of the relevant criminal statute by the Florida Supreme Court had decriminalized the conduct at issue, but post-conviction relief was denied. Finding that result improper, the Court reaffirmed its teaching in *Fiore* observing: "It has long been established by this Court that the Due Process Clause...forbids a State to convict a person of a crime without proving the elements of that crime [as properly interpreted] beyond a reasonable doubt." *Bunkley*, 155 L.Ed.2d at 1051.

The decision in *Cleveland*, like those underpinning *Fiore* and *Bunkley*, changed the law as then understood in the Third Circuit given *Martinez*, but its holding was not new law. Rather, *Cleveland* was a definitive interpretation of the scope of the mail fraud statute as such existed from the date of its enactment because this Court's decisions construing substantive criminal statutes must be accorded full retroactive effect. Petitioner having been indicted and tried on the basis of a now invalid theory of criminal liability, one included in the jury charge, was therefore convicted of "a crime without [the prosecution] proving the elements of that crime beyond a reasonable doubt" in violation of the Due Process Clause.[14]

This constitutional error, as well as the absence of subject-matter jurisdiction, were asserted in Petitioner's §2255 Motion as compelling his conviction be set aside. The District Court demurred though, as the Opinion stated, on its "holding that certain insurance licenses were property under the mail fraud statute" notwithstanding *Cleveland* and *Neder*. (App. 6a). Since that conclusion was plainly wrong given the retroactive effect of *Cleveland* and *Neder*, it was entirely proper for Petitioner to attack the denial of his §2255 Motion under Rule 60(b)(4) as a void judgment.

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[14] *See Middleton v. McNeil*, 158 L.Ed.2d 701, 706-07 (2004) ("In a criminal trial, the [prosecution] must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.")

Although Rule 60(b)(4) is the appropriate vehicle to attack a void judgment, when the precedent relied upon by the District Court to reach its determination has been overturned, even if such does not thereby void the judgment, Rule 60(b)(5) is available to attack the decision for it requires a judgment be set aside when "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."[15] For example, given the Opinion's representation the District Court premised the denial of Petitioner's §2255 Motion on its "holding that certain insurance licenses were property under the mail fraud statute" as in *Martinez* (App. 6a), that "prior judgment [was] a necessary element of the decision" making such amenable to attack under Rule 60(b)(5) for *Cleveland* in reversing *Martinez* stripped the District Court of all support for its erroneous decision. *Lubben v. Selective Service*, 453 F.2d 645, 650 (1st Cir. 1972).

Then too, since the mailings and wirings charged in the indictment were sent for the "purpose" of obtaining or retaining state regulatory licenses, conduct which cannot constitute a violation of §1341 or §1343 after *Cleveland* and *Neder*,[16] it is in the words of Rule 60(b)(5) "no longer equitable that the judgment [of conviction] should have prospective application" for such "is clearly erroneous and would work a manifest injustice" because Petitioner is actually innocent of the offenses of conviction.

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[15] The Opinion erroneously claimed that while Petitioner's Rule 60(b) "motion contains a reference to Rule 60(b)(4), [he] primarily relies on (b)(5)." *Id.* at 3 n.1 (App. 4a). But that assevation cannot be true for the 127-page memorandum in support of the §2255 Motion repeatedly cited Rule 60 (b)(4) as dictating vacatur of the void *Stewart II* judgment due to its jurisdictional, due process, and justicibility lapses, matters hardly embraced by a single "reference to Rule 60(b)(4)" as the Opinion declared.

[16] As long ago as *United States v. Maze*, 414 U.S. 395, 405 (1974), this Court held that although "Congress could have drafted the mail fraud statute so as to require only the mails be in fact used as a result of the fraudulent scheme, it did not do this; instead it required that the use of the mails 'be for the purpose of executing [the charged] scheme'." In light of *Cleveland* and *Neder*, this definitive statement of the substantive law voided the District Court's judgment denying the §2255 Motion for the "purpose" of the charged mailings and wirings, even the charged "scheme" itself, cannot constitute mail or wire fraud, a deficiency susceptible to Rule 60(b)(4) attack.

Agostini v. Felton, 521 U.S. 203, 236 (1997). *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (Rule 60(b)(5) is validly invoked when there is "a significant change in factual conditions or in the law").

As to Rule 60(b)(6), which was also advanced as a basis for vacating *Stewart II*, this Court has long held that Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-615, *modified on other grounds*, 336 U.S. 942 (1949). While §2255 contains a provision empowering one to submit a successive motion based on "newly discovered evidence," that vehicle was established to permit the introduction of factual evidence of actual innocence and does not seemingly also embrace a challenge to the legal basis of an erroneous judgment denying §2255 relief so as to make it the exclusive remedy to cure such a defect. Instead, where the district court has committed a plain error of law which demands redress, such may be attacked under Rule 60(b)(6) because if one's –

> conviction and punishment are for an act that the law does not make criminal [there] can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under §2255.

Davis, supra, 417 U.S. at 346-47.

In drafting the AEDPA, Congress chose not to impose the identical restrictions on successive habeas corpus petitions filed by state prisoners under §2254 and federal prisoners pursuant to §2255. The limiting language of §2244(b)(1) and (2), both of which apply solely to §2254 habeas applications, unmistakably demonstrates this intent. But given *Gonzalez*, that reservation has been misconstrued by the courts below in adopting a blanket prohibition precluding any Rule 60(b) attack on even a plainly erroneous substantive decision reached in a prior §2255 proceeding as those courts have conflated the rules applicable to §2254 and

§2255 proceedings, thereby thwarting the clear intent of Congress and wording of §2244(b)(1) and (2). In fact, its absolute bar would materially exceed in proscription even the limitations recognized in *Gonzalez* where exceptions to such an absolute bar were permitted in the §2254 context as noted above. Because this case presents matters not only compelling reversal of the decision below, but those particularly advantageous to analysis of the scope of Rule 60(b)(4), (5), and (6) within the §2255 context, the grant of a COA and issuance of the writ to review this case is strongly indicated.

II

When a Precedent Relied Upon by a District Court to Deny a §2255 Motion is Overruled the then Defective Judgment is Prudently Attacked by a Motion Under Rule 60(b)(4), (5), or (6), as Applicable.

The District Court in denying Petitioner's pre-trial Rule 12(b)(2) motion to dismiss the indictment relied upon the existent circuit precedent represented by *Martinez* to conclude the alleged licensing theory of criminal liability supported the charged mail and wire fraud offenses. Thus when *Cleveland* overturned *Martinez*, that decision, based on a fully retroactive interpretation of the substantive criminal statute, seemingly required Petitioner's conviction and sentence be set aside as sought in his §2255 Motion. However, in again denying Petitioner relief, the District Court in *Stewart II* pointed to *Asher*, another Third Circuit precedent, as allowing that a court could ignore the existence in the indictment and jury charge of an invalid theory of criminal liability should the "bottom line" of the alleged conduct ultimately result in a property loss to some third party regardless of the purpose of the alleged scheme or the charged mailings and wirings. *Id.*, 151 F.Supp.2d at 583 (App. 23a).

That rationale did not long survive though as this Court in *Griffin* held that the existence of an invalid theory of criminal liability presented to a jury voided the resultant conviction for:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question…fails to come within the statutory definition of the crime.

Griffin, 502 U.S. at 59. Unfortunately, while *Griffin* overruled in 1991 the rationalization expressed in *Asher* in 1988, the Third Circuit did not visit that conflict until after the District Court had in 2001 denied the §2255 Motion on the basis of *Asher*, and a companion case following *Asher* that *Griffin* similarly overruled, *United States v. Osser*, 864 F.3d 1056 (3rd Cir. 1988), which is cited in *Stewart II* as the sole decision adopting the reasoning of *Asher*. *Id.*, 151 F.Supp.2d at 582 (App. 22a). Subsequently, in *Murphy*, the Third Circuit squarely confronted the antagonistic views reflected in *Griffin* and *Asher* concluding that *Griffin* had undermined *Asher* so that "current precedent [that is, *Griffin*] dictates that, should we find one of the Government's theories of mail fraud legally invalid, we must reverse [the] conviction on the mail fraud counts and remand for a new trial" on any remaining valid grounds. *Id.*, 323 F.3d at 109-10.

While *Murphy* was cited in the Rule 60(b) Motion as compelling vacatur of the judgment denying the §2255 Motion in *Stewart II*, The District Court again failed to grant Petitioner relief. Instead, the Opinion maintained that while the Rule 60(b) Motion had asserted *Murphy* and *Cleveland* combine to "'void' the 'merits' of th[e] Court's ruling" in *Stewart II*, that was forbidden by *Gonzalez* and §2244(b)(1) for the Motion "seeks to relitigate substantive issues already decided by this Court in a prior habeas proceeding." (App. 6a). In effect, the District Court affirmed a plainly erroneous judgment, one that directly conflicts with the teaching of its Court of Appeals and is contrary to fully retroactive substantive rulings of this Court, premised solely on a statutory provision not even applicable in the §2255 context. More to the point, the District Court would also affirm its "holding that certain insurance licenses were property under the mail fraud statute and [thereby] sustain [Petitioner's] conviction even though [the licensing theory of criminal liability] used by the government was declared legally invalid by the Supreme Court" as it conceded in

Stewart II (App. 16a), but would now attribute solely to Petitioner's reading of *Cleveland*. Opinion at 5 (App. 6a).

Because *Bousley, Schriro,* and *Gonzalez* all agreed this Court's definitive interpretation of a substantive criminal statute is fully retroactive, it would be striking in the extreme should a statute that is applicable only in the §2254 context could, given *Fiore* and *Steel Co.*, bar the teaching of *Cleveland* and *Neder* from divesting the District Court of subject-matter jurisdiction. Moreover, as *Murphy* in interpreting *Griffin* directed that, at least in the Third Circuit, the inclusion of an invalid theory of criminal liability in the indictment and jury charge compels a new trail, that directive also divested the District Court of subject-matter jurisdiction to deny Petitioner relief under §2255 as requested in his Rule 60(b) Motion. Together, these errors argue in the strongest possible terms for the grant of a writ of certiorari, not only to reverse the defective judgment below, but to ensure the lower federal courts are provided guidance as to the availability of Rule 60(b) to attack rulings made in a §2255 proceeding lest other courts, such as those here, mistakenly *assume* its use is identical in the §2254 and §2255 contexts.

III

A District Court's Unexplainable Refusal to Permit a Requested Evidentiary Hearing to Determine Controverted Issues of Fact is a Defect in the Integrity of a §2255 Proceeding Which is Prudently Challenged by a Rule 60(b) Motion to Set Aside the Resulting Deficient Judgment.

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, and determine the issues and make findings of fact and conclusions of law in respect thereto.

28 U.S. §2255. By that mandate a district court is directed to grant a §2255 movant an opportunity to prove the facts alleged in his motion unless it is "conclusively show[n]" by the materials in the court's hands he "is entitled to no relief." Yet, while the District Court in the case at bar required the United States attorney to respond to the §2255 Motion, directed extensive briefing of the issues presented, and in respect to one issue even entertained limited oral argument, it denied, without any explanation, Petitioner's repeated requests for an evidentiary hearing and discovery. That was plain error for some one-third of the Memorandum in support of the §2255 Motion, nearly 40-pages in all, were devoted to identifying various factual predicates demonstrating counsel failed to provide the effective assistance required by the Sixth Amendment as enumerated in *Strickland v. Washington*, 466 U.S. 668, 697, (1984).

The Memorandum's presentation identified how trial counsel had failed to undertake the comprehensive pre-trial investigation necessary to counter the allegations advanced in the indictment, declined to interview prosecution witnesses and its purported experts, and was unable to assemble an experienced and competent trial team once the District Court had, only weeks before trial was to begin, disqualified the law firm Petitioner had retained as lead counsel based on a purported conflict. Then too, the Memorandum explained how appellate counsel failed to perform the legal research necessary to identify then recent cases distinguishing professional licenses from state regulatory licenses, while also overlooking contemporary decisions undermining the District Court's sentencing rulings that would have materially reduced Petitioner's ultimate sentence. This foundational deficiency is especially poignant for in seeking a writ of certiorari, appellate counsel noticed the licensing issue based on the same distinctions cited in the cases he had neglected on appeal, claiming that such a "jurisdictional" issue need not have been noticed on appeal – an infirmity which may have caused the Court to pass on

the licensing issue in this case but three months before accepting the same issue for review in *Cleveland*.[17]

The matters presented in the §2255 Motion concerned in the main those occurring wholly "outside the presence of the trail judge" that could "not ordinarily be resolved by him without…a hearing," which given the mandate of §2255, should have compelled the grant of an evidentiary hearing. *Armiente v. United States*, 234 F.3d 820, 825 (2nd Cir. 2000). However, the District Court dismissed all such matters as "completely meritless," *Stewart II*, 151 F.Supp.2d at 585 (App. 27a), without any inquiry into their veracity, affording Petitioner no opportunity to prove such by an evidentiary hearing, nor did it "make findings of fact" in respect thereto as §2255 directs.

The District Court's failure to grant the requested evidentiary hearing also amounted to a denial of due process for a "District Court d[oes] not proceed in conformity with 28 U.S.C. §2255 when it ma[kes] findings on controverted issues of fact without notice to the petitioner and without a hearing." *Machibroda v. United States*, 368 U.S. 387, 394-95 (1962). Given the observation in *United States v. McCoy*, 410 F.3d 124, 134 (3rd Cir. 2005), "recogniz[ing] that '[t]he standard governing…requests [for evidentiary hearings] establishes a reasonably low threshold for habeas petitioners to meet'," (quoting *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001) (brackets in original), Petitioner sought by the Rule 60(b) Motion to have the District Court's denial of an evidentiary hearing vacated.

The Opinion, however, while noting "one aspect of [the] Rule 60(b) motion [was] procedural" and thus susceptible to a Rule

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[17] Whether counsel was aware or not of the cases differentiating professional licenses from state regulatory licenses, and thus providing a basis for distinguishing *Martinez* from the case at bar, it was unreasonable for counsel to have ignored an issue so central to the prosecution's case which had been decided by a majority of the other circuits in an antipodal manner, for as Judge Easterbrook observed, "When precedent is adverse, a few sentences flagging the point suffices to preserve an argument for resolution" and avoids any questions as to a later claim of procedural default. *United States v. Messino*, F.3d 704, 715 (7th Cir. 2004).

60(b) attack even under its limiting view of the AEDPA (App.6a), identified that issue as being its *sua sponte* refusal to issue a COA, not the failure to grant an evidentiary hearing as §2255 and *Machibroda* require. Although the Opinion omits any explanation for this refusal to address the hearing issue, the District Court apparently viewed its ruling as a substantive decision and thus barred by §2244(b)(1) from Rule 60(b) review. That result though is neither supported by *Gonzalez*, nor the terms of §2244(b)(1). In point of fact, *Gonzalez* recognized that even in the §2254 context when "a previous ruling which precluded a merits determination was in error – for example, a denial for such reason as...procedural default," it was appropriate to attack this defect via Rule 60(b) as such adversely impacts the integrity of the habeas proceeding. *Id.*, 162 L.Ed.2d at 492-93 n.4.

Given *Gonzalez*, it was plain error for the District Court to have foreclosed any attack upon its ruling denying Petitioner an evidentiary hearing to support his ineffectiveness of counsel claim which would have excused the purported procedural default cited in *Stewart II*. (App. 12a). Moreover, it was improper to have recharacterized this procedural claim as a substantive decision in an attempt to bring such within the prohibition of §2244(b)(1) although, of course, that provision has no application outside of a §2254 proceeding. This effort not only offends *Gonzalez* and §2255, but suggests the potential for even further misunderstandings, thereby recommending strongly the Court issue the writ to vacate the Opinion while delimiting the scope of Rule 60(b) as it applies within the context of a §2255 proceeding.

CONCLUSION

For the reasons stated above, it is respectfully requested the Court grant a certificate of appealability and issue a writ certiorari to the United States Court of Appeals for the Third Circuit to review the erroneous judgment entered below.

Respectfully submitted,

Allen W. Stewart
Pro Se
Reg. No. 50449-066
Federal Prison Camp La Tuna
Post Office Box 8000
Anthony, New Mexico 88021

October 18, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Case No: 06-1566

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART,

Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, and NYGAARD, Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: July 21, 2006

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*The vote of the Honorable Richard L. Nygaard, Senior United States Circuit Judge, is limited to panel rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. No. 06-1566

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART

(E.D. Pa. Crim. No. 96-cr-00583)
(Criminal treated as Civil)

Present: BARRY, SMITH, NYGAARD, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. §2253 (c)(1) in the above referenced case.

Respectfully,
Clerk

ORDER

The foregoing request for a certificate of appealability is denied. The majority of Appellant's Rule 60(b) motion constitutes a second or successive habeas petition. See Gonzalez v. Crosby, 125 S.Ct. 2641 (2005). Because Appellant did not receive authorization from this Court to file the motion, jurists of reason could not debate that the District Court properly determined that it lacked authority to consider these claims. See 28 U.S.C. §2244. However, Appellant's motion also attacked the integrity of the underlying §2255 proceeding. With respect to these arguments, Appellant has failed to show that jurists of reason would debate that the District Court's procedural rulings were incorrect. See Morris v. Horn, 187 F.3d 333 (3rd Cir. 1999).

BY THE COURT,
/s/ D. Brooks Smith
Circuit Judge

Dated: June 14, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 96-583
v.	:	
	:	CIVIL ACTION
ALLEN W. STEWART	:	NO. 00-6299

MEMORANDUM

Bartle, J. September 13, 2005

Before the court is the motion of Allen W. Stewart ("Stewart") pursuant to Rule 60(b) of the Federal Rules of Civil Procedure "requesting the Court vacate its June 7, 2001 order denying Petitioner's §2255 motion or in the alternative issue a certificate of appealability."

A jury convicted Stewart in December, 1997 of 135 counts of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961, *et seq.* He was also found guilty of violating the federal mail fraud, wire fraud, and money laundering statutes. 18 U.S.C. §§1341, 1343, 1957. On August 13, 1998 Stewart was sentenced to 15 years imprisonment, and an order of restitution in the amount of $60.1 million was entered against him. His conviction and sentence were subsequently affirmed by the Court of Appeals, *United States v. Stewart*, 185 F.3d 112 (3rd Cir. 1999), *cert. denied sub nom., Stewart v. United States*, 528 U.S. 1063 (1999).

Stewart timely filed his 28 U.S.C. §2255 motion on December 12, 2000 to vacate, set aside, or correct his sentence. On June 7, 2001, this Court denied the motion and did not issue a certificate of appealability. *Stewart v. United States*, 151 F. Supp. 2d 572 (E.D. Pa. 2001). Stewart appealed on July 30, 2001 and,

when informed by the Court of Appeals his appeal would be treated as a request for a certificate of appealability, filed an amended motion seeking the same. The Court of Appeals denied the application for a certificate of appealability on August 29, 2002. On March 10, 2003 the Supreme Court denied the Petitioner's petition for a writ of certiorari. *Stewart v. United States*, 538 U.S. 908 (2003).

I.

Rule 60(b) sets forth various grounds under which a court may relieve a party from a final judgment or order. Stewart seeks relief from our order of June 7, 2001 denying his motion under 28 U.S.C. §2255.[1] The first issue before us is whether Stewart's Rule 60(b) motion should be treated as a motion under §2255. If so, it is his second such motion, and we have no subject matter jurisdiction unless and until he seeks and obtains an order from the Court of Appeals authorizing us to consider the matter. *See* 28 U.S.C. §2244(b); *Robinson v. Johnson*, 313 F.3d 128, 139-40 (3rd Cir. 2002); *In re Page*, 170 F.3d 659, 661 (7th Cir. 1999). If Stewart's Rule 60(b) motion is not a §2255 motion, we have jurisdiction to decide it. Both the Supreme Court and our Court of Appeals have addressed the interplay between Rule 60 (b) motions and motions under 28 U.S.C. §§2254 and 2255. *See Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005); *Pridgen v. Shannon*, 380 F.3d 721, 727 (3d. Cir. 2004). For present purposes, second and successive motions under §2254 and §2255 are treated the same. *See Tavares v. Meyers*, 129 Fed.Appx. 694, 696 (3rd Cir. 2005).

In *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005), the Supreme Court held that a Rule 60(b) motion will be considered a de facto habeas petition under §2254 if it brings a "claim," that is, if the motion "attacks the federal court's previous resolution of a

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[1] Though his motion contains a reference to Rule 60(b)(4), Stewart primarily relies on (b)(5). Rule 60(b)(5) provides that a court may relieve a party from a final judgment or order where "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Rule 60(b)(4) allows the court to grant relief if the "judgment is void."

claim *on the merits*." 125 S.Ct. at 2647. The Court explained that is using the phrase "on the merits" it was referring to a "determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief..." *Id.* at 2648 n.4. "When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." *Id.* The Court commented:

> a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent §2244 (b)(2)(A)... In addition...use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar.

125 S.Ct. at 2647-8.

Last year, the Court of Appeals for the Third Circuit held in *Pridgen* that when a Rule 60(b) motion "is in conflict with provisions of the [Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] [Act]...it constitutes the equivalent of a successive habeas corpus petition and should be dismissed." *Pridgen*, at 729. Only in those instances where the "factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction" can the motion be heard without prior certification by the court of appeals. *Id.* at 727. The *Pridgen* Court emphasized that when a petitioner seeks to "collaterally attack...[his] underlying conviction, the motion should be treated as a successive habeas petition." *Id.*

In sum, in *Gonzalez* and *Pridgen* the Supreme Court and our Court of Appeals, respectively, have made clear that Rule 60(b) motions may not be used to end-run the statutory prohibitions of the AEDPA against second and successive habeas petitions. A Rule 60(b) motion will be deemed a §2254 or §2255 motion whenever it attacks the merits of an underlying conviction or sentence.

II.

Though couched in procedural and jurisdictional language, most of Stewart's Rule 60(b) motion challenges the legal basis of his conviction. Stewart renews his attacks on his conviction by urging this Court to vacate its June 7, 2001 order based on a newly decided Court of Appeals opinion that, in his view, "void[s]" the "merits" of this Court's ruling. *See United States v. Murphy*, 323 F.3d.102 (3rd Cir. 2003). His argument rests on his assertion that we erred in holding that certain insurance licenses were property under the mail fraud statute and in sustaining his convictions even though, according to him, one of the mail fraud theories used by the government was declared legally invalid by the Supreme Court. *See Cleveland v. United States*, 531 U.S. 12 (2000); *United States v. Murphy*, 323 F.3d.102 (3rd Cir. 2003); 18 U.S.C. 1341.

Stewart attempts to use Rule 60(b) to do precisely what *Gonzalez*, *Pridgen* and §2244 forbid. He seeks to relitigate substantive issues already decided by this Court in a prior habeas proceeding. The only way Stewart can secure a second bite at the apple is to obtain an order from the Court of Appeals authorizing this Court to consider the claim. Until that time, we have no subject matter jurisdiction over his motion dealing with the merits of his conviction and sentence. *See* 28 U.S.C. §2244(b); *Robinson v. Johnson*, 313 F.3d at 139-40; *In re Page*, 170 F.3d at 661.

III.

There is one aspect of Stewart's Rule 60(b) motion, however, that is procedural and does not specifically attack the merits of his conviction and sentence. Stewart's argues that this Court erred when it *sua sponte* refused to issue a certificate of appealability in its order of June 7, 2001 without affording Stewart a hearing and additional briefing. *See Stewart*, 151 F. Supp. 2d at 585. The Fifth Circuit has observed that "[i]t is perfectly lawful for district court's to deny [a] COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability

having been issued." *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). The Court went on to observe that a district court is often in the best position to rule on a certificate of appealability and that doing so *sua sponte* saves needless repetition in briefing and argument. *Id.* Stewart cites two Supreme Court cases which he contends support his position. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000). Neither case is on point. We agree with the Court in *Alexander* and find Stewart's contrary argument to be meritless.

Thus, to the extent that Stewart's Rule 60(b) motion challenges our failure to give him a chance to be heard before our *sua sponte* denial of a certificate of appealability in our June 7, 2001 order, his motion will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 96-583
v.	:	
	:	CIVIL ACTION
ALLEN W. STEWART	:	NO. 00-6299

ORDER

AND NOW, this 13th day of September, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of Allen W. Stewart pursuant to Rule 60(b) of the Federal Rules of Civil Procedure "requesting the Court vacate its June 7, 2001 order denying Petitioner's motion in accordance with 28 U.S.C. §2255 or in the alternative issue a certificate of appealability," except as noted in paragraph (2) herein, is DENIED without prejudice to his right to file a motion in the United States Court of Appeals for the Third Circuit for an order authorizing this Court to consider the application under 28 U.S.C. §2244(b)(3); and

(2) the motion pursuant to Rule 60(b) is DENIED to the extent the motion seeks an opportunity to be heard on the issuance of a certificate of appealability in connection with this Court's Order of June 7, 2001.

BY THE COURT:

/s/ Harvey Bartle III
J.

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART

Criminal Action No. 96-583
Civil Action No. 00-6299

United States District Court for the
Eastern District of Pennsylvania

June 7, 2001
(151 F. Supp. 2d 572)

Before the court is the motion of Allen W. Stewart ("Stewart") under 28 U.S.C. §2255 to vacate, set aside, or correct sentence.

Stewart was convicted by a jury in December, 1997 of 135 counts of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et seq.*, as well as federal mail fraud, wire fraud, and money laundering statutes. 18 U.S.C. §§1341, 1343, 1957. The charges arose out of Stewart's involvement in a complex scheme to loot Summit National Life Insurance Company ("Summit") and Equitable Beneficial Life Insurance Company ("EBL"). The jury also determined that certain of Stewart's assets were subject to forfeiture under the RICO and money laundering laws. On August 13, 1998 Stewart was sentenced to 15 years imprisonment, and an order of restitution in the amount of $60.1 million was entered against him. His conviction and sentence were subsequently affirmed by the Court of Appeals, *United States v. Stewart*, 185 F.3d 112 (3rd Cir. 1999), and the Supreme Court thereafter denied certiorari. *Stewart v. United States*, 528 U.S. 1063, 145 L. Ed. 2d 512, 120 S. Ct. 618 (1999).

I.

Stewart's timely collateral attack first challenges his convictions for mail fraud under 18 U.S.C. §1341[1] and wire fraud under 18 U.S.C. §1343[2]. To support his argument that these convictions must be vacated, Stewart relies on *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000), decided after the Supreme Court denied certiorari in this case, and thus after his conviction became final. *Cleveland* held that licenses issued by the states are not property within the meaning of the federal mail fraud statute[3]. Since the mail fraud statute "requires the object of the fraud to be 'property' in the victim's hands," the Court concluded that the use of fraud to obtain a state license does not fall within the ambit of §1341. 121 S. Ct. at 374. Thus, even though "licensees may have property interests in their licenses," using a scheme or artifice to defraud in order to obtain a license from a state regulator does not constitute a violation of §1341. Id.

Before turning to the merits of Stewart's *Cleveland* argument, we must decide whether his claim is procedurally defaulted[4]. While Stewart raised the issue of licenses not

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[1] Title 18 U.S.C. §1341 provides in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ...places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or takes or receives therefrom, any such matter or thing, ..., shall be fined under this title or imprisoned not more than five years, or both.

[2] The wire fraud statute is identical to the mail fraud statute except that the wrongdoer "transmits or causes to be transmitted by means of wire, ...any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. §1343.

[3] While *Cleveland* dealt only with the federal mail fraud statute, it is also applicable to the federal wire fraud statute. *See United States v. Tarnopol*, 561 F.2d 466, 475 (3rd Cir. 1977).

[4] We note that Stewart attempts to couch his *Cleveland* argument as a nonwaivable jurisdictional defect of which there can be no procedural default. We disagree with this characterization. In *Cleveland* the Court interpreted the term "property" in a different, more restrictive manner than some lower courts had. In that sense it is analogous to cases such as *Bailey v. United States*, 516 U.S. 137, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995), where the term "using" a

constituting property under the mail and wire fraud statutes prior to trial and in his certiorari petition, he did not assert it during his direct appeal. The Supreme Court most recently addressed procedural default in *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). *See also United States v. Frady*, 456 U.S. 152, 167, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982). *Bousley* made clear that the procedural default rule applies to claims arising under decisions like *Cleveland* which hold "that a substantive federal criminal statute does not reach certain conduct." 523 U.S. at 620. If such a claim has been procedurally defaulted because it was not raised on direct review, "the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Id.* at 622 (citations omitted).

"Cause" for failing to raise a claim exists if the claim had "no reasonable basis in existing law." *Reed v. Ross*, 468 U.S. 1,. 15, 82 L. Ed. 2d 1, 104 S. Ct. 2901 (1984). In other words, a defendant may demonstrate "cause" for his procedural default if an issue was "so novel that its legal basis [was] not reasonably available to counsel." Id. Stewart's *Cleveland* claim is not "so novel" as to constitute cause. *See Bousley*, 523 U.S. at 622. At the time of Stewart's trial and appeal the question whether licenses were property under §1341 was a hotly contested issue subject to great debate in the lower courts. Many circuits had already reached the conclusion licenses were not property for purposes of the mail fraud statute. *See United States v. Shotts*, 145 F.3d 1289, 1296 (11th Cir. 1998); *United States v. Schwartz*, 924 F.2d 410, 418 (2d Cir. 1991); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988). Several circuits, including our Court of Appeals, had made the

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firearm in 18 U.S.C. §924(c)(1) was redefined, and *McNally v. United States*, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987), where the reach of the mail fraud statute was restricted to exclude an intangible rights theory. Courts addressing the application of *Bailey* and *McNally* in post-conviction proceedings have not excused procedural default unless the test for doing so has been met. *See, e.g., Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998); *United States v. Osser*, 864 F.2d 1056 (3rd Cir. 1988); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988).

opposite determination. *See United States v. Salvatore*, 110 F.3d 1131, 1138 (5th Cir. 1997); *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709, 715 (3rd Cir. 1990). Clearly then, the basis of the claim was not novel at the time of Stewart's direct appeal.

Stewart notes that it was because of the binding authority of the Third Circuit's decision in *Martinez* that he did not raise the license issue on direct appeal. In other words, he contends it would have been futile for him to do so. The Supreme Court has explicitly stated that this position is unavailing because "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Bousley*, 523 U.S. at 623 (*quoting Engle v. Isaac*, 456 U.S. 107, 130 n.35, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982)). Since "a §2255 movant cannot show 'cause' for failing to make...[an] argument on direct appeal by demonstrating that circuit law at the time would have made any such argument futile," Stewart has no "cause" for his default. *United States v. Ramos*, 147 F.3d 281, 287 (3rd Cir. 1998).

Stewart also argues that his counsel was ineffective for failing to raise the *Cleveland* issue on appeal. "It is now well-established that a successful claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, ...satisfies the 'cause' prong of a procedural default inquiry." *United States v. Garth*, 188 F.3d 99, 107 (3rd Cir. 1999). In order to establish a claim of ineffective assistance of counsel under *Strickland* that rises to the level of constitutional error, a petitioner must prove: (1) counsel's performance "fell below an objective standard of reasonableness," that is, that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) the deficient representation prejudiced petitioner, that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687-88.

It is well settled that when choosing which issues to raise on appeal, "[a]n exercise of professional judgment is required. Appealing losing issues 'runs the risk of burying good

arguments...in a verbal mound made up of strong and weak contentions.'" *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3rd Cir.1996) (quoting *Jones v. Barnes*, 463 U.S. 745, 753, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)). Only in rare cases will failure to raise an issue on appeal constitute ineffective assistance of counsel because the "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986) (internal quotations omitted).

Stewart's trial lasted approximately six weeks. Numerous pretrial, trial, and post-trial motions were made and ruled on by this court. There existed a plethora of issues that could have been appealed. Stewart's counsel chose to pursue 10 issues on appeal in a lengthy 85 page brief. Viewed in light of Third Circuit law at the time, the license issue was weak and unlikely to prevail. *See Martinez*, 905 F.2d at 715. Thus, the decision not to pursue it clearly, "fell within the 'wide range of professionally competent assistance' required under the Sixth Amendment to the Federal Constitution." *Smith*, 477 U.S. at 536 (quoting *Strickland*, 466 U.S. at 690).

Furthermore, "there is no general duty on the part of defense counsel to anticipate changes in the law," *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3rd Cir. 1989), and failure to do so does not constitute ineffective assistance of counsel. *See Sistrunk*, 96 F.3d at 672; *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990). Keeping in mind that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight," we find that the failure of Stewart's counsel to anticipate the Supreme Court's ruling in *Cleveland* does not amount to ineffective assistance of counsel and that Stewart has therefore failed to show "cause" for the procedural default. *Strickland*, 466 U.S. at 688.

The only way which Stewart's lack of "cause" for this procedural default can be excused is if he can establish "actual innocence." *Bousley*, 523 U.S. at 623. To establish "actual innocence" a defendant must show that "in light of all the

evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* "Simply stated, 'actual innocence'...means that the person did not commit the crime." *Garth*, 188 F.3d at 107 (internal quotations omitted). If a defendant can demonstrate "actual innocence," then the court can consider the merits of the defaulted claim. *Id.* at 107-8.

Stewart simply cannot take advantage of this exception, reserved for a "fundamental miscarriage of justice." *Herrera v. Collins*, 506 U.S. 390, 404, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). There was overwhelming evidence presented at trial that Stewart devised schemes to defraud people of money and property other than licenses, including premiums from policyholders and customers, dividends, and various types of fees. Furthermore, the jury clearly found that property other than licenses was obtained through his schemes because it returned special verdicts requiring Stewart to forfeit specific amounts of money and pieces of property under the RICO and money laundering forfeiture laws. Given the above, Stewart clearly cannot meet the *Bousley* standard, which requires him to show that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." 523 U.S. at 623. He has not established that he is "actually innocent" of his mail and wire fraud convictions and has thus procedurally defaulted his *Cleveland* claim.

II.

Even if we are incorrect that Stewart procedurally defaulted his *Cleveland* claim, he cannot succeed on the merits. Stewart argues that he is entitled to relief under *Cleveland* because the superseding indictment under which he was charged defined property under the mail and wire fraud counts to include licenses among other items. As a result, Stewart maintains his conviction was flawed since licenses are not property under the mail and wire fraud statutes.

Stewart was charged in a lengthy and detailed 157 count superseding indictment[5]. Count 1 alleged a RICO violation and

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[5] Counts 3, 5-13, 15, 20, 21, 23, 34, 35, 74, 75, 119 and 120 were removed from the case prior to its submission to the jury.

charged that Stewart had committed four racketeering acts, or schemes. As recorded on the verdict sheet, the jury found that Stewart committed all four schemes alleged, as well as all of their predicate acts. Racketeering Act No. 1 alleged a scheme to conceal the insolvency of Summit in order to permit Stewart to continue to control and operate it. Act No. 1 cited 17 predicate acts of mail fraud which Stewart allegedly committed[6]. Racketeering Act No. 2, which incorporated mail fraud counts 2 through 19 as its predicate racketeering acts, charged a scheme to loot Summit and EBL of their valuable assets. Act No. 3, which incorporated wire fraud counts 24 through 32, alleged a scheme to deceive regulators regarding reinsurance. Finally, Act No. 4 charged that the defendant devised and executed a scheme to inflate Summit's financial statements with an overvalued promissory note. It relied upon mail fraud counts 33 through 120 as its predicate racketeering acts[7].

The superseding indictment charged that through the operation of the above schemes Stewart obtained money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting and management fees, and an inflated sales price for Summit. *See* Superseding Indictment at 17, ¶ 52; 31, ¶ 34; 42, ¶ 25; 47, ¶ 13[8].

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[6] During the trial and before submission of the case to the jury we struck predicates acts 1C-1E, 1G-1O and 1W. *United States v. Stewart*, Crim. A. No. 96-583, 1998 WL 372426 (E.D. Pa. June 2, 1998); N.T., Dec. 16, 1997, at 27.

[7] Counts 121 through 155 of the superseding indictment alleged violations of the federal money laundering statute during the operation of the looting scheme described in counts 2 through 23. The superseding indictment also included a RICO forfeiture count and a money laundering forfeiture count.

[8] The relevant paragraphs of the superseding indictment are reproduced below.

RICO Count 1 ¶ 52: "It was part of the scheme that by all the foregoing the defendant Allen W. Stewart and other entities he controlled would and did obtain money and property, including Summit, the funds to purchase Summit, licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, money from investors, legal fees and other fees."

After *Cleveland*, it is now clear that fraudulently obtaining licenses from state regulators does not amount to a violation of §1341 and §1343. Stewart argues that even a mere possibility that the jury convicted him under the legally deficient theory that state insurance licenses constitute property under the mail and wire fraud statutes mandates that his convictions be vacated under the authority of *Yates v. United States*, 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978).

In *Yates* a jury convicted the defendants of conspiring to violate the Smith Act which prohibited (1) advocating the duty and necessity of overthrowing the United States Government and (2) organizing a group as the Communist Party. Id. at 300. On appeal the defendants argued that the court improperly instructed the jury on the meaning of the term "organize," which resulted in their conviction of a crime barred by the statute of limitations. Since the Communist Party came into being in 1945, but the indictment was not forthcoming until 1951, the three-year statute of limitations had expired on the "organizing" charge, and defendants therefore could not be found guilty of it. *Id.* at 312. The Government contended that even if the "organizing" charge was infirm, the conviction should stand because the jury also found defendants guilt of the "advocacy" charge. The Supreme Court disagreed, explaining that it had "no way of knowing whether the overt act found by the jury

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Mail Fraud Counts 2-19 ¶ 34: "It was part of the overall scheme described above that, in addition to the money and property described above, the defendant Allen W. Stewart, and others would obtain, directly or indirectly, other money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, legal fees, and an inflated sales price for the companies."

Wire Fraud Counts 24-32 ¶ 25: "It was part of the scheme that by all the foregoing the defendant Allen W. Stewart and other entities would obtain money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, and an inflated sales price for Summit National Life Insurance Company."

Mail Fraud Counts 33-124 ¶ 13: "It was part of the scheme that by the foregoing, the defendant Allen W. Stewart and other entities would obtain money and property, licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, and attorney fees and an inflated sales price for Summit."

was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy." *Id.* at 311-12. The Court held that "[i]n these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.

Yates was an extension of *Stromberg v. California*, 283 U.S. 359, 368, 75 L. Ed. 1117, 51 S. Ct. 532 (1931), where the Supreme Court held that if any of the grounds upon which a general verdict rests "is invalid under the Federal Constitution, the conviction cannot be upheld." It marked the first time that the Supreme Court applied *Stromberg* "to a general verdict in which one of the possible bases of conviction did not violate any provision of the Constitution but was simply legally inadequate (because of a statutory time bar)." *Griffin v. United States*, 502 U.S. 46, 55, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991). A further extension of *Stromberg* was sought in *Griffin*. There, the defendant argued that under *Yates* her conviction for a multiple-object conspiracy should be set aside because the evidence was inadequate to support conviction as to one of the objects. The Supreme Court rejected the argument. It held that a general verdict is valid as long as one of the possible bases of conviction is supported by sufficient evidence. *Griffin*, 502 U.S. at 56-57. The Court's holding rested upon an important distinction from *Yates*:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59. In other words, "[c]ourts assume that juries can distinguish good proof from bad, but juries do not separate good *law* from bad. That's the line between *Yates* and *Griffin*." *Tenner v. Gilmore*, 184 F.3d 608, 611 (7th Cir. 1999).

Stewart argues that his situation falls on the *Yates* side of the line because the jury was instructed that it could convict him of mail and wire fraud if they found he had fraudulently schemed to obtain state insurance licenses, a legally insufficient theory after *Cleveland*. The charge to the jury did not specifically mention licenses. It did, however, refer the jury to the superseding indictment on various occasions for a description of the schemes alleged. The jury was instructed that in order to convict Stewart of mail and wire fraud it had to find that he "knowingly devised or intended to devise a scheme or artifice to defraud or to obtain money or property by false or fraudulent pretenses, representations or promises as detailed in the superseding indictment." As mentioned above, the superseding indictment defined money and property to include licenses and the retention of licenses, as well as premiums from policyholders and customers, dividends, consulting and management fees, and an inflated sales price for Summit.

We agree with Stewart that as a result of the later decided *Cleveland* case the jury charge, through the incorporation of the superseding indictment, contained a legally deficient theory of criminal liability. We disagree, however, with Stewart's contention that his convictions must therefore be set aside. To begin with, Stewart's convictions on counts 2 through 19 and 20 through 23 are valid because his money laundering convictions operate as a special verdict as to these counts[9]. "Special verdicts avoid the *Yates* problem, because the court then can be confident that the facts as the jury believed them to be are a legally proper basis of conviction." *Tenner*, 184 F.3d at 612.

[9] Stewart was actually only convicted on counts 2, 4, 14, 16-19, and 22, as the other counts were stricken prior to trial. For simplification, however, we will refer to the overall group of counts that make up a scheme. We will also do this for counts 33 through 120, even though some of the individual counts in that group were also stricken.

To convict Stewart of money laundering as charged in counts 121 through 155 the jury was required to find that the money identified in the counts was "derived from specified unlawful activity, that is mail fraud, in violation of Title 18, United States Code, Section 1341, as charged in Counts 2 through 19 of this indictment, and wire fraud, as charged in Counts 20 through 23 of this indictment." Superseding Indictment at 60, 62, 64-68. Thus, Stewart's conviction on counts 121 through 155 makes it clear that the jury found that money, not licenses, was an object of the scheme alleged in counts 2 through 19 and 20 through 23. Since money is a proper object of a scheme to defraud under the mail and wire fraud statutes, we are "absolutely certain that the jury relied upon the legally correct theory to convict the defendant," and we will not set aside his conviction on counts 2 through 19 and 20 through 23. *Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (internal quotation omitted). As these counts were the predicate acts for Racketeering Act No. 2, it also stands.

As for counts 24 through 120 and the other three racketeering acts, the charge insofar as it referred to licenses was legally wrong[10]. However, the evidence was also insufficient to convict on the basis of fraudulently obtained licenses. At trial there was virtually no evidence regarding the obtaining or retaining of licenses. What little there was all referred to time periods before the time alleged in the superseding indictment. In such a case, we conclude that *Griffin*, not *Yates*, must control because "there is no possibility that the jury convicted the defendant[] on the improper charge." *United States v. Wilson*, 116 F.3d 1066, 1080 (5th Cir. 1997); *see United States v. Hanafy*, 124 F. Supp. 2d 1016, 1030 n.20 (N.D. Tex. 2000). Such a result is also necessary if we are to "recall the point of *Griffin*: a jury may be relied on to get the facts right and avoid logical errors." *Tenner*, 184 F.3d at 612.

In support of his position, Stewart points to the fact that the superseding indictment describes how he caused Parkway Life Insurance Company and Cathedral Life Insurance Company to be

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[10] As noted, under the prevailing authority of *Martinez*, the charge was legally correct when given. *Martinez* was subsequently abrogated by *Cleveland*.

formed. Superseding Indictment at 37, ¶ 2; 25, ¶ 7. Since these insurance companies had to obtain new state regulatory licenses, Stewart argues that this is evidence the jury could have used to convict him of a scheme to obtain licenses. He ignores the fact that these formations occurred in 1989, at least three years before any crime or scheme alleged in the superseding indictment. The jury was specifically charged that to convict Stewart on counts 24 through 120 they needed to find that the schemes alleged in those counts were devised in late 1992 and early 1993[11]. Stewart would thus have us presume that the jury ignored this legal instruction and also its duty as judges of the facts. Making this presumption would be contrary to the holding of *Griffin*, that "perverse factfinding should not be attributed to juries." *Tenner*, 184 F.3d at 612. It would also contravene "the almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987); *see Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985).

The above conclusion is supported and compelled by *McNally v. United States*, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987). *McNally*, like *Cleveland*, involved a restriction of the scope of the federal mail fraud statute. In *McNally* a former

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[11] The relevant portions of the charge read as follows:

> Counts 24 through 32 charge a wire fraud scheme to deceive state insurance regulators involving reinsurance. The superseding indictment alleges that in late 1992 or early 1993 the defendant devised a scheme to deceive state regulators and others regarding the true and complete reinsurance arrangements involving Summit National Life Insurance Company, its subsidiary Fidelity General Life Insurance Company, and the Alabama Reassurance Company in order to inflate their financial statements.
>
> Counts 33, 36 through 73, and 76 through 118 of the superseding indictment charge that from in or about December, 1992 to in or about July, 1993 the defendant devised and intended to devise a scheme to defraud and to obtain money and property by inflating Summit National Life Insurance Company's financial statements with overvalued promissory notes from its corporate parent, SNL Corp., in order to deceive regulators, the buyer, and others regarding the true financial condition of the company and the United States mails were used in furtherance of this scheme.

Kentucky public official and a private individual were charged and convicted of violating the federal mail fraud statute based upon the theory that they "defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *Id.* at 352. The Supreme Court reversed their convictions on direct appeal, holding that §1341 does not prohibit "schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 355.

In restricting the reach of the mail fraud statute to exclude an intangible rights theory, *McNally* overturned a "line of decisions from the Courts of Appeals" holding the opposite. *Id.* Not surprisingly, the decision resulted in a deluge of petitions from defendants convicted under the pre-*McNally* interpretation of §1341 who sought to have their convictions overturned. One such case was *United States v. Asher*, 854 F.2d 1483 (3rd Cir. 1988). In *Asher* the defendant was convicted on five counts of mail fraud due to his participation in a scheme to accept bribes in exchange for awarding a no-bid Social Security tax ("FICA") recovery contract to CTA Limited ("CTA"). On appeal Asher argued that *McNally*, which was issued after his conviction, mandated that his convictions be overturned.

The court examined the treatment other courts had given post-*McNally* cases and found that, "those cases that have *sustained* mail fraud convictions have done so where the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state." *Id.* at 1494. It explained:

> Essentially, therefore, where rights are involved whose violation would lead to no concrete economic harm, and where those rights are the only rights involved in the case, *McNally's* proscriptions would prevent upholding conviction on appeal. Where, on the other hand, a violation of the rights involved would result in depriving another of something of value, and the indictment, the proofs and the instructions are based on that fact, then the presence of intangible rights language will not prove fatal on appeal.

Id. Applying the above precepts, the court upheld Asher's mail fraud convictions. It arrived at this result by first noting that both the indictment and the jury instructions in the case contained numerous references to "concrete economic or property losses." *Id.* at 1495. While the jury instructions also made references to intangible losses, this was not fatal because the court was "satisfied that the government...could not have proved a violation of intangible rights without simultaneously proving that the Commonwealth of Pennsylvania was deprived of money as the result of the no-bid contract awarded to CTA." *Id.* at 1496. Since the jury "could not have found a fraudulent scheme that consisted solely of depriving the citizens of their right to honest government that did not also involve tangible losses," Asher's conviction was allowed to stand. *Id.*

The same result was reached in *United States v. Osser*, 864 F.2d 1056 (3rd Cir. 1988), in a collateral attack filed after the defendant's conviction was final and after the Supreme Court decided *McNally*. Osser, a City Commissioner of Philadelphia, was found guilty of seven counts of mail fraud in 1973. The jurors in Osser's case were instructed that they could find a violation of §1341 on several different theories. One theory involved a kickback scheme in which Osser participated. That theory was still valid after *McNally*. The other involved his deprivation of the citizens of Philadelphia of his honest and impartial services through a bid rigging scheme, an invalid theory after *McNally*.

Osser argued that his convictions must be vacated "because the issue of guilt was submitted to the jury on two theories, one of which was invalid," essentially the same argument Stewart is making under *Yates*. *Osser*, 864 F.2d at 1058. After analyzing *Asher*, the court disagreed, reasoning that once the jury "found that Osser had participated in the bid rigging, [it] could not escape finding financial loss as part of the scheme." *Id.* at 1063. Since Osser's actions unquestionably "resulted in a substantial monetary detriment to the City, and no rational juror could conclude otherwise," the court refused to vacate Osser's

convictions and affirmed the district court's denial of his *coram nobis* petition. Id.[12]

We see no practical distinction between *Asher* and *Osser* and Stewart's case. *Cleveland*, like *McNally*, restricted the scope of the federal mail fraud statute by holding that state issued licenses were not property for its purposes. Stewart, like Asher and Osser, was convicted by a jury that heard references to what turned out to be an invalid legal theory in the indictment and the charge. Like the courts in *Asher* and *Osser*, we conclude that the mere presence of the invalid license theory does not mandate that Stewart's conviction be vacated. We do so because there is no way the jury could have found that Stewart committed mail fraud by devising a scheme to obtain or retain licenses and not have found he devised a scheme to obtain other money and property as well. *See Asher*, 854 F.2d at 1496. Even if the jury were to have found a scheme to obtain licenses, the ultimate purpose of such a scheme necessarily would have been to enable Stewart to obtain money and property in the form of premiums from policyholders and customers, dividends, consulting and management fees, and the inflated sales price for Summit. Since "the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses," Stewart's mail and wire fraud convictions will not be vacated because of any reference in the charge to licenses. *Id.* at 1494.

III.

Stewart also argues in his §2255 motion that the superseding indictment was defective because it failed to allege explicitly that he made "material" misrepresentations in furtherance of his schemes. This argument was not raised previously. Subsequent to Stewart's indictment and conviction the Supreme Court held in *Neder v. United States*, 527 U.S. 1, 25, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999) that "materiality of falsehood is an element of the federal mail fraud, wire fraud and bank fraud

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[12] Prior to reaching the merits of Osser's case, the court affirmed the district court's determination that Osser had procedurally defaulted his *McNally* claim under *Frady* because he did not raise it at trial or on appeal. This supports our earlier conclusion that a claim such as the one Stewart is making under *Cleveland* can be procedurally defaulted.

statutes." Because the word "material" does not appear in the superseding indictment's allegations of mail and wire fraud, Stewart argues that the superseding indictment is fatally deficient and his convictions must be vacated.

An indictment must set forth all of the elements of an offense, and if it does not do so, it is fundamentally flawed. *United States v. Spinner*, 180 F.3d 514, 515-16 (3rd Cir. 1999). When a challenge to the indictment's sufficiency is raised for the first time after trial, as is the case here, we are to "construe the indictment liberally in favor of validity." *United States v. Cefaratti*, 221 F.3d 502, 507 (3rd Cir. 2000). Even assuming that Stewart's contention is not procedurally defaulted, we conclude that it is without merit.

As indictment satisfies the requirements of the Fifth and Sixth Amendments "if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). Although it is vital for an indictment to include all elements of a charged offense, "the law does not compel a ritual of words" when determining if an indictment is sufficient. *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989); *see United States v. DeVegter*, 198 F.3d 1324, 1330 (11th Cir. 1999). Our Court of Appeals has instructed:

> [A]n indictment may set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence [sic] intended to be punished. Furthermore, an indictment that charges a legal term of art sufficiently charges the component parts of the term.

Cefaratti, 221 F.3d at 507 (internal quotations and citations omitted).

In support of his position, Stewart heavily relies on *United States v. Spinner*. There the court on direct appeal found the indictment for access device fraud to be deficient because it failed to allege the interstate commerce element of the crime charged. *Spinner*, 180 F.3d at 515-16. The access device fraud statute, 18 U.S.C. §1029(a)(5), specifically requires that the "offense affects interstate or foreign commerce."

We reject Stewart's reliance on *Spinner*. Unlike *Spinner*, the superseding indictment here did not omit any statutory element of the crimes charged. The mail and wire fraud statutes require "a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. §§1341, 1343. They nowhere use the word "material." Mirroring the statutes, the superseding indictment stated that Stewart "devised and intended to devise a scheme to defraud and to obtain money or property, directly or indirectly, by means of false and fraudulent pretenses and representations."

The word "fraud" is a "legal term of art." *Cefaratti*, 221 F.3d at 507. At common law, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." *Neder*, 527 U.S. at 22; *see United States v. Coffman*, 94 F.3d 330, 335 (7th Cir. 1996). Here, the superseding indictment repeatedly charges that Stewart made false and fraudulent representations and promises. Because the work "fraudulent" clearly encompasses the notion of materiality, the superseding indictment cannot be considered deficient[13].

In addition, we conclude that by any reasonable construction, the superseding indictment identifies misrepresentations that can only be characterized as material even though the word "material" is not used. *See United States v. Richards*, 204 F.3d 177, 192 (5th Cir.), *cert. denied*, 531 U.S. 826 (2000). In *Neder*, the Court explained that "a matter is material

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[13] We note that Stewart does not argue that the jury charge on mail and wire fraud was incorrect. The jury was specifically instructed that it must find a false statement or misrepresentation of material fact in order to convict Stewart of mail and wire fraud.

if…'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts §538 (1976)).

The superseding indictment is replete with Stewart's misrepresentations concerning the financial well-being of Summit and EBL, sham reinsurance agreements, and the movement of funds between entities he controlled. For example, the superseding indictment charges that Stewart: provided false financial statements and reports to regulators, policyholders, customers, insurance agents, and others in order to conceal the financial weakness of Summit; falsely represented that Summit was in excellent financial condition when in fact it was statutorily insolvent; reclassified assets of entities he owned and backdated journal entries; and included a sizeable but worthless promissory note as an asset on Summit's books.

There can be not doubt a reasonable person would attach importance to the above misrepresentations. An insurance agent contemplating selling policies for Summit, a customer considering purchasing a policy from Summit, a current policyholder making payments to Summit, or a regulator charged with overseeing Summit's compliance with the law all would find the false statements and representations Stewart made important, relevant, and material. Clearly, an "inference of materiality" arises, especially when we "construe the indictment liberally." *Cefaratti*, 221 F.3d at 507. We therefore reject Stewart's contention that the superseding indictment was insufficient.

In sum, the superseding indictment in this case performed its constitutional function. It fully apprised Stewart of the charges against him and did not hinder him from presenting a vigorous defense prior to and during trial. Thus, Stewart's mail and wire fraud convictions will not be vacated because the word "material" does not appear in the counts of mail and wire fraud contained in the superseding indictment.

IV.

Stewart argues that he is entitled to various forms of relief due to the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63. Stewart contends that the *Apprendi* rule mandates that his conviction be set aside, or alternatively, that his sentence be reduced. He also maintains that his forfeiture and restitution sentences are invalid under *Apprendi*. We have already held that *Apprendi* does not apply retroactively to cases on collateral review and therefore will not address here the merits of these arguments. *See United States v. Gibbs*, 125 F. Supp. 2d 700 (E.D. Pa. 2000).

V.

Stewart also raises several other ineffective assistance of counsel claims that we find completely meritless. Finally, Stewart argues numerous other grounds that he believes mandate vacatur of his convictions and/or sentence. They are unpersuasive and require no discussion.

VI.

In conclusion, the motion of Allen W. Stewart under 28 U.S.C. §2255 to vacate, set aside, or correct sentence will be denied.

ORDER

AND NOW, this 7th day of June, 2001, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of Allen W. Stewart under 28 U.S.C. §2255 to vacate, set aside, or correct sentence is DENIED; and

(2) a certificate of appealability is not issued.

BY THE COURT:

/s/ Harvey Bartle III

J.

UNITED STATES OF AMERICA

v.

ALLEN W. STEWART

Criminal Action No. 96-583

United States District Court for the
Eastern District of Pennsylvania

October 23, 1997
(1997 WL 688815)

This is a criminal action in which defendant Allen Stewart is charged under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.* The superseding indictment also contains separate counts of mail and wire fraud as well as money laundering and seeks forfeiture of certain assets. Presently before the court is the motion of the defendant to dismiss the superseding indictment for failure to state an indictable offense[1].

In a motion to dismiss an indictment we accept as true the facts alleged and determine if those facts "constitute the violation of law for which [the defendant] is charged." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir.), *cert. denied*, 488 U.S. 851, 109 S. Ct. 135, 102 L. Ed. 2d 107 (1988); *United States v. Seitz*, 952 F. Supp. 229, 230 n.1 (E.D. Pa. 1997). If the facts do not constitute a violation of federal law, the charges should be dismissed. *Polychron*, 841 F.2d at 834.

The superseding indictment, which consists of 157 counts, charges that defendant committed a pattern of racketeering activity through his association with Summit National Life Insurance

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[1] The original indictment was filed on December 4, 1997. Defendant filed a motion to dismiss the indictment, which we denied in a Memorandum and Order on February 21, 1997. The government filed its superseding indictment on March 12, 1997.

Company ("SNLIC"), an insurance company now incorporated in Pennsylvania. Defendant originally purchased SNLIC in 1988, when it was incorporated in Ohio. By acts of wire and mail fraud, he allegedly devised and furthered schemes to siphon millions of dollars out of SNLIC as well as Equitable Beneficial Life Insurance Company ("EBL"), another Pennsylvania life insurance company he controlled. Through a series of transactions which inflated the book value of SNLIC's and EBL's assets, he purportedly concealed his theft of funds from the public, insurance regulators, policyholders, customers, potential customers, insurance agents, and others.

Specifically, Count 1 charges defendant with violating §1962(c) of RICO. Counts 2 through 120 assert that defendant committed mail and wire fraud in violation of 18 U.S.C. §§1341 and 1343. The superseding indictment declares in several places that defendant "devised and intended to devise a scheme to defraud and to obtain money and property, directly and indirectly, by means of false and fraudulent pretenses and representations." *See, e.g..*, Superseding Indictment at p. 23, ¶ 3. It describes the various mail and wire fraud schemes created by defendant. It details the mailings and wires, including the places from which they were sent and the persons to whom they were directed. The first scheme, set forth in Counts 2 through 23 involved the removal of valuable assets from SNLIC and EBL. To facilitate this scheme defendant purportedly sent quarterly financial statements to the Pennsylvania Insurance Department, among others. Checks for payment of printing or publication of annual statements were sent to publishing companies, letters were sent to Merrill Lynch seeking the transfer of funds, and wires were even sent to EBL itself[2].

The government also alleges, in Counts 24 through 32, a design to deceive regulators regarding reinsurance. It was advanced through wires sent to the California Department of Insurance and to and from Alabama Reassurance Company. Counts 33 through 130 portray a stratagem to inflate SNLIC's financial statements with an overvalued promissory note from is

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[2] Count 2 states that an abstract of an SNLIC annual statement was mailed to Corporation Publication in Nevada.

corporate parent, SNL Corporation. SNLIC financial statements, identifying this inflated asset, were mailed to insurance departments in 43 states, the National Association of Insurance Commissioners, and A.M. Best Company. Several checks were also sent to publishing companies to pay for the printing or publication of the SNLIC financial statements.

According to the superseding indictment, the object of these three schemes was to "obtain, directly and indirectly, other money and property, including licenses and the retention of licenses, premiums from policyholders and customers, dividends, consulting fees, management fees, legal fees, and an inflated sales price for the companies." Superseding Indictment, at p.31, ¶ 34. The remainder of the superseding indictment includes allegations that defendant illegally laundered money in violation of 18 U.S.C. §1957. The final two counts seek forfeiture of money and property obtained as a result of his alleged racketeering and money laundering activity. In his pending motion, defendant asserts various bases for the dismissal of the superseding indictment. Only one of these arguments requires any extended discussion. Defendant contends that, under the mail and wire fraud statutes, an indictment must allege that any deceit or fraud was directed at the party from whom money or property was sought. According to defendant, the superseding indictment is fatally defective because it states that the fraud was directed at the government regulators but does not specify that any money or property was sought or taken from them. Even if the insurance department officials were the only intended victims, defendant's argument is without merit.

The mail fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ...places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or takes or receives therefrom, any such matter or thing, ..., shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §1341[3]. The Supreme Court has explained that the elements of this crime include: "(1) a scheme to defraud, and (2) the mailing of a letter, etc. for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira v. United States*, 347 U.S. 1, 8, 74 S. Ct. 358, 98 L. Ed 435 (1954).

In *McNally v. United States*, 483 U.S. 350, 358-59, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), the Supreme Court held that a defendant's scheme or artifice must have as its purpose to deprive a victim of money or property in order to be convicted under the mail fraud stature. *McNally* involved the prosecution of a Kentucky public official and a private citizen. They had participated in a scheme whereby an insurance agency receiving business from the Commonwealth of Kentucky paid a portion of the commissions the agency received from insurers to another insurance agency in which the official had an interest. *Id.* at 352-54. While the Commonwealth lost no money or property in the scheme, the federal prosecutor claimed that this ploy "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.* at 353. However, the Supreme Court concluded that this was too broad a reading of the mail fraud statute and overturned the conviction. *Id.* at 360. It held that a scheme or artifice to defraud must have as its aim the purloining of money or property. *Id.* at 359.

Unhappy with the Supreme Court's decision in *McNally*, Congress enacted 18 U.S.C. §1346. *See* 134 Cong. Rec. H.B. 108-01, 1988 WL 182261 (Oct. 21, 1988). As a result of this statute, a "'scheme or artifice to defraud' now includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. §1346. While other Courts of Appeals have determined that this language is limited to the honest services of government officials, the Third Circuit has not passed upon its scope. *See United States v. Brumley*, 116 F.3d 728, 734-35 (5th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3204 (U.S. Sept. 15, 1997) (No. 97-486); *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

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[3] The wire fraud statute is identical except that the wrongdoer "transmits or causes to be transmitted by means of wire, ... any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. §1343.

The Third Circuit has made clear, nonetheless, that the mail fraud statute is to be construed broadly. *United States v. Martinez*, 905 F.2d 709, 715, (3rd Cir.), *cert. denied*, 498 U.S. 1017, 111 S. Ct. 591, 112 L. Ed. 2d 595 (1990). In *Martinez*, the defendant was convicted of mail fraud for his role in obtaining for a co-conspirator a medical license from the Commonwealth of Pennsylvania. *Id.* at 710-11. On appeal he contended that the mail fraud statute required a scheme or artifice to deprive a victim of money or property but that the Commonwealth of Pennsylvania, as the victim, did not suffer any such loss. *Id.* at 713. The Third Circuit rejected this argument. It held that the medical license constituted property within the meaning of the statute. *Id.* at 713-15. It stated:

> *McNally* only requires that the [g]overnment's interest as property holder" be implicated in order for a scheme to fall within the mail fraud statute…a license is essentially one manifestation of the government "largess" of the modern state which "is originally public property, comes from the state, and may be withheld completely." … [W]hat the Commonwealth (and derivatively its people) lost was the right to keep its medical licenses to itself and to bestow them on persons who had fairly earned them.

Id. at 714 (citations omitted).

In Pennsylvania as in other states as well, the business of insurance, like the medical profession, is highly regulated. Without state authorization, one cannot open or operate an insurance company anymore than one can open or conduct a medical practice. An insurer in the Commonwealth must obtain a "certificate authorizing the company to commence business." Pa. Stat. Ann. tit. 40, §405 (West 1992). To maintain its authority to do business, an insurer must remain financially sound. One way for the Insurance Department to determine if an insurer continues to be viable is to review its financial statements, which it is required by law to file. *Id.* §443(a)(1). Failure to file can result in fines and a prohibition against writing new business. *Id.* §443 (e)(1). In addition, the Insurance Commissioner may even

"suspend, revoke or refuse to renew the certificate of authority of any insurer failing to file its annual statement when due." *Id.* §443(e)(3)[4].

Implicit, of course, is the duty to submit accurate information. By filing purportedly deceptive financial statements which appeared to show SNLIC as a financially healthy insurer, defendant schemed to retain the certificate authorizing SNLIC to conduct business in Pennsylvania and other states. While the certificate, like the medical license in *Martinez*, may take on value only in the hands of the recipient, it is the property of the Commonwealth nonetheless. *Martinez*, 905 F.2d at 713. If a recipient retains a certificate through fraud and deception, the Commonwealth and its people lose the right to have the certificate returned and to keep it from those who no longer are fairly entitled to it. *Id.* at 714.

Even if the certificate authorizing an insurer to do business is not property, we are still not required to dismiss the superseding indictment. In several places, the superseding indictment makes clear that the defendant "devised and intended to devise a scheme to defraud *and* to obtain money and property." Superseding Indictment at p. 23, ¶ 3, p. 39, ¶ 12, p. 45, ¶ 3 (emphasis added). Thus, more than an effort to obtain money and property is alleged. Under 18 U.S.C. §1346, a scheme to defraud is defined to "include[] a scheme or artifice to deprive another of the intangible right of honest services." The scheme here had the effect of depriving the Commonwealth and its citizens of the honest services of its public servants who regulate insurance companies doing business within its borders. Defendant's stratagem was to deceive the Pennsylvania Insurance Department into believing that SNLIC was a healthy insurance company when it was not. Because of defendant's alleged fraud, the Department was prevented from doing its sworn duty to protect the SNLIC policyholders and the insurance buying public generally.

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[4] The Insurance Commissioner may also require that the insurer file its financial statements with the National Association of Insurance Commissioners. Pa. Stat. Ann. tit. 40, § 443(a)(2) (West Supp. 1997).

Defendant relies upon *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir.1989), in support of his argument that the mail and wire fraud counts are deficient. In that case, the New York Superintendent of Insurance filed a civil RICO action, predicated on acts of mail fraud, against a corporation and its officers. The Superintendent alleged that the defendants absconded with millions of dollars from two insurers, and then hid the theft of such funds. *Id.* at 17. However, *Corcoran* is inapposite here for several reasons. First it was a civil case, applying the law prior to the enactment of 18 U.S.C. § 1346. The Court of Appeals for the Second Circ. it held that the Superintendent, acting as Liquidator, could not assert claims of mail fraud against defendants who allegedly looted two insurers. *Id.* at 17, 21. The court found that his complaint lacked allegations that he had been deprived of any property interest. *Id.* at 21[5]. Unlike *Corcoran*, the government here alleges that the regulators *were* deprived of a property interest. *Corcoran* seemed to take a much narrower view of property than the Third Circuit set forth in *Martinez*. We are bound by *Martinez*, not *Corcoran*[6].

Several of the defendant's other arguments address concerns that the jury will be confused by the various schemes as set forth in the superseding indictment. If a conviction occurs, he will not know upon which scheme the conviction is based. Defendant also challenges the incorporation of paragraphs and counts into other counts. Our focus on a motion to dismiss the superseding indictment is on whether the defendant himself is appropriately put on notice of the charges against him so that he may prepare his defense. To the extent that any argument concerning jury confusion has merit, it can be addressed at trial

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[5] However, the court also found it "unnecessary to answer the general question whether the mail fraud statute requires that the party deceived also be the party injured." *Corcoran*, 886 F.2d at 20.

[6] To the extent the defendant also seeks dismissal of racketeering act 1 contained in RICO Count 1, his argument is also without merit. Racketeering act 1, entitled a "[s]cheme to conceal the insolvency of [SNLIC] to permit the defendant to continue to control and operate it," lists multiple acts of mail and wire fraud as its basis. These acts included sending financial statements to insurance departments, mailing checks to publishing companies for payment of printing/publication costs, as well as wiring funds.

through the redaction of the superseding indictment, a detailed verdict sheet, or an explanatory charge.

Defendant's remaining arguments are without merit and require no discussion. In conclusion, the motion of the defendant to dismiss the superseding indictment will be denied.

ORDER

AND NOW, this 22nd day of October, 1997, for the reasons set forth in the accompany Memorandum, the motion of defendant Allen W. Stewart to dismiss the superseding indictment is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
J.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

1. Article I, Section 9 of the United States Constitution provides in pertinent part that:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. The Fifth Amendment to the United States Constitution provides in pertinent part that:

> No person shall be held to answer for a[n] infamous crime, unless on a presentment or indictment of a Grand Jury, ...nor shall any person...be deprived of life, liberty, or property, without due process of law...

3. The Sixth Amendment to the United States Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; ...and to have the Assistance of Counsel for his defence.

4. 18 U.S.C. §1341 provided in pertinent part at the time of the alleged offenses that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ...for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ...or takes or receives therefrom, any such matter or thing, or knowingly causes

to be delivered by mail...according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more that five years, or both.

5. 18 U.S.C. §1343 provided at the time of the alleged offenses that:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of faults or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

6. 18 U.S.C. §3231 provides in pertinent part that:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

7. 28 U.S.C. §2244 provides in pertinent part that:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this sub-section.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

8. 28 U.S.C. §2254 provides in pertinent part that:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a

writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas of corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

9. 28 U.S.C. §2255 provides in pertinent part that:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

Unless the motion and the files and records of the case conclusively show the prisoner is entitled to no relief, the court shall…grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of

law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by the law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

10. Federal Rule of Criminal Procedure 12(b) at the time of trial provided in pertinent part that:

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: ...(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

11. Federal Rule of Civil Procedure 60(b) provides in pertinent part that:

> On motion and upon such terms as are just, the court may relieve a party...from a final judgment, order, or proceeding for the following reasons: ...(4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.